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RESPONSIBLE GOVERNMENT IN THE BRITISH COLONIAL SYSTEM

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The present paper deals with the circumstances under which the right of self-government was acquired by the province of Canada. It is concerned chiefly with the period that elapsed between the presentation of Lord Durham's report, in which "responsible government" was recommended, and the passing of the Rebellion Losses Bill of 1849, whose sanction by Lord Elgin indicates the final and complete adoption of this principle. Special emphasis is laid upon the constitutional crisis that occurred under the administration of Sir Charles Metcalfe with a view to placing in its proper historical perspective the influence exercised by the colonial reform party in the evolution of the imperial system. It is the aim of the paper to show that the interpretation of the principle of responsible government now prevailing was not present in the minds of imperial statesmen at the time of the adoption of the Act of Union of 1840, commonly assigned as the date of the inception of self-government. The essay is based upon the papers of Lord Sydenham and

Lord Metcalfe, the collection of Baldwin pamphlets in the Toronto Public Library, certain official documents of the Canadian archives, and other original sources which the writer has had occasion to consult in preparing his biographies of Baldwin, LaFontaine, and Hincks in the *Makers of Canada Series*.[1]

The essay as thus conceived, can profess to be nothing more than a contribution towards one part of a more general subject. The present era is critical in the history of the British Empire. The rapid growth of the greater colonies is bringing their relation to the mother country and the question of reconstruction of imperial relations into the foreground of public discussion. The time is opportune for the critical study of the theory and history of the political evolution of the colonial system. A complete investigation of responsible government should be conducted under three heads: (1) The history of its adoption; (2) the legal analysis of the relations thereby established; (3) a discussion of its present operation. Only the first of these divisions of the general subject is here treated.

The popular form of the theory of colonial self-government is based, as Lord Stanley indicated to the House of Lords over half a century ago,[2] upon two highly contradictory propositions; the first, that the British empire is a State, the second, that the colonies govern themselves. To this popular conception of the theory involved is added the popular interpretation of colonial history to the effect that the leading statesmen of Great Britain on the advice of Lord Durham granted self-government to the colony of (United) Canada. A critical analysis

[1] Morang & Co., Toronto, 1907.

[2] Speech of Lord Stanley on the Canadian Question. London *Times*, June 19, 1849.

conducted under the three divisions of the subject indicated above, and which may be said to represent the domains of history, law, and contemporary politics, will show that limitations must be introduced into these simple propositions at every step. The history of the subject shows that it was the colonial rather than the imperial statesmen who truly apprehended and strenuously exacted the application of the principle of autonomy. Legal analysis establishes, in a formal sense, something very like a denial of colonial self-government; and a study of contemporary conditions—treaty relations, trade relations, conflicts of jurisdictions and the exigencies of imperial defense—might well develop the fact that responsible government does not offer the last word on British colonial evolution. It is customary to regard the principle of autonomy as having served during the last fifty years as the corner stone of the imperial structure. No denial of this proposition is here intended. The object of this paper is merely to aid in formulating a more scientific analysis of the inter-imperial relations thus established than is customary in the commonplace discussion of militant politics.

The subject here treated begins with the presentation of Lord Durham's report. But it is necessary to say a few words of the antecedent history. Canada was ceded to Great Britain by the treaty of 1763. For a year after the cession it remained under military rule. Civil government was established by royal proclamation in 1764, and systematized by Act of Parliament ten years later. The Quebec Act of 1774[3] entrusted the government to a governor and legislative council. It declared it "inexpedient to call an assembly." Not until the Constitu-

[3] 14 Geo. III., c. 83.

tional Act of 1791[4] which separated Upper from Lower Canada was the principle of popular representation introduced. That statute established in each province a legislature of two houses, the lower house, or assembly, elected by the people; the upper, or legislative council, nominated by the crown. To the governor general of Lower Canada and to the lieutenant governor of Upper Canada was adjoined an executive council. The tenure of office of the latter was entirely outside of the control of the legislature. This government lasted till 1841. Under it, serious discontent arose in each province. The assembly found itself without adequate financial control, a part of the revenue being raised by imperial statute and lying outside of its power. Under this system of appointment there grew up government by a class. In Lower Canada, the governing class was largely British. This added racial antagonism to the bitterness of the class struggle. In Upper Canada the reservation of a large part of the public land for the Church of England constituted an increasing grievance. The influence of war, hard times, and political agitation embittered the situation. The veiled republicanism of the colonial radical stiffened the neck of the ultra British tory. Agitation culminated in 1837 in armed revolt. There was a spiritless attempt to capture Toronto, a stubborn fight of the French peasantry on the Richelieu, some random marauding on the frontier, and the attempt at revolution by force of arms collapsed. But the insurrection bore fruit. The conscience of Downing Street was aroused. John Lambton, first Earl of Durham, was sent out as high commissioner and governor general of British North America. Meantime, the Constitution of Lower

[4] 31 Geo. III., c. 31.

Canada was suspended (January, 1838) by Act of Parliament.

The matchless report presented by Lord Durham to the imperial government recommended the re-union of the two provinces with a view to terminating the racial contest by rendering certain an ultimate British predominance; it recommended also a change in the system of administration by the introduction of responsible government. The precise form of the recommendations made in this connection deserve citation in detail. But it is of importance first to notice that the suggestion of the introduction of the principle of ministerial responsibility as a solution of colonial grievances was no new thing. In Lower Canada, indeed, this demand had formed no part of the programme of the reformers; but in Upper Canada for more than a decade past the demand had been definitely formulated and warmly espoused by the moderate wing of the reform party. This fact is amply evidenced by the text of the report itself which speaks of the demand for responsible government as the leading principle of the reform party. "The reformers of Upper Canada,"[5] said Lord Durham, "directed their exertions to obtaining such an alteration of the executive council as might have been obtained without any derangement of the constitutional balance of power. * * * It was upon this question of the responsibility of the executive council that the great struggle has been for a long time carried on between the official party and the reformers. * * * The views of the great body of the reformers appear to have been limited, according to their favorite expression, to making the colonial constitution an exact transcript of that of Great Britain, and they only desired

[5] Lord Durham's Report. (Methuen & Co., 1902, p. 107.)

that the crown should in Upper Canada, as at home, entrust the administration of affairs to men possessing the confidence of the assembly."

The opinions of the reformers may be found still more explicitly stated by consulting the documentary history of the period preceding the rebellion. To this history only a casual reference is here possible. In 1829, a public meeting was held at Toronto (then York) to protest against the dismissal of Judge Willis. A petition[6] was sent to the king, reciting provincial grievances and asking reforms. The eighth grievance recited is "the want of carrying into effect that rational and constitutional control over public functionaries, especially the advisers of your majesty's representative, which our fellow subjects in England enjoy in that happy country." The demand is made for "a legislative act to facilitate the mode in which the present constitutional responsibility of the advisers of the local government may be carried practically into effect." The Canadian Alliance Society of 1834 and the Constitutional Reform Society formed in July, 1836, had both demanded responsible government in set terms. The famous Seventh Report on Grievances presented to the assembly of Upper Canada in 1835 contained an explicit presentation of the need of responsible government." "One great excellence of the English constitution," said the report,[7] "consists in the limits it imposes on the will of a king by requiring responsible men to give effect to it. In Upper Canada no such responsibility can exist. The lieutenant governor and the British ministry hold in their hands the whole patronage of the provinces: they hold the sole dominion of the

[6] The text is cited in the Seventh Report from the Select Committee of the House of Assembly of Upper Canada on Grievances.

[7] Report, p. xxvi. Printed by G. M. Reynolds, Toronto, 1835.

country and leave the representative branch of the legislature powerless and dependent." On the appointment of Sir F. B. Head as lieutenant governor, the reformers had endeavored to force from him a recognition of the principle of responsibility. On his refusal to give it, his three newly appointed ministers, of whom Robert Baldwin was one, resigned office. Baldwin, in writing of the event, says:[8] "I explained fully to his excellency my views of the constitution of the province and the change necessary in the practical administration of it, particularly as I considered the delay in adopting this change as the great and all absorbing grievance before which all others in my mind sank into insignificance." After the suppression of the rebellion and before the arrival of Lord Durham, the reformers of Toronto started a journal called *The Examiner*, edited by Francis Hincks, which bore the motto "Responsible Government," conspicuously printed on its front page.

We may contrast with this the attitude of the British statesmen and their representatives. In regard to the demand of the petitioners in the matter of Willis, who had asked for a practical form of responsibility, the Hon. E. G. Stanley wrote evasively that "there would be great difficulty in arranging such a plan."[9] Lord Glenelg wrote in reference to the demands made in the Seventh Report on Grievances that the government of Upper Canada was responsible to his majesty and to Parliament.[10] Sir Francis Head wrote a few months later (March 22, 1836) to the colonial secretary: "I became fully convinced that an attempt somewhere or other was

[8] Robert Baldwin to Peter Perry. (Cited by F. Taylor. *British American*, vol. iii, p. 72.

[9] Letter of Stanley to W. W. Baldwin, April 24, 1829.

[10] Glenelg to Head, December 5, 1835.

making to promulgate an error which has long been artfully circulated in this province, namely, that the executive council was responsible to the people for the acts of the lieutenant governor. The object of this smooth faced insidious doctrine was at first to obtain for the council merely responsibility, and when that point was conceded, immediately to demand from the crown the power and patronage which has hitherto been invested in the lieutenant governor." Still more notable is the pronouncement of Lord John Russell in Parliament (May 16, 1836) that the demand for an executive council responsible to the colonial house of assembly was "inconsistent with the relations of a colony and the mother country" and that "it would be better to say at once, 'Let the two countries separate than for us to pretend to govern the colony afterwards.'"

Such was the position of the question at the time of Lord Durham's visit to Canada. It would be extremely interesting to know in detail exactly what communications passed between Lord Durham and the Upper Canadian reformers or what personal discussions were held during his brief visit to Toronto. There is here a link in the history of Lord Durham's report still to be supplied. It is possible that the manuscript collection of Durham papers recently acquired by the Canadian archives department may, upon investigation, throw light upon the matter.[11] It would be of extreme historical importance to discover whether Lord Durham's views were not based quite as much upon the practical outlook of the colonial reformers, enlightened by the evident object lesson of the past decade, as upon the theoretical liberalism

[11] Since writing the above, the writer is informed that among the papers in question is a formal argument in favor of responsible government presented to Lord Durham by Dr. W. Baldwin, father of Robert Baldwin.

of the English school represented by the high commissioner.

The precise form of Lord Durham's suggestions for the reconstruction of the colonial system is seen in the following extracts.

"Without a change in our system of government, the discontent which now prevails will spread and advance. * * * It is difficult to understand how any English statesman could have imagined that representative and irresponsible government could be successfully combined. * * * It has never been clearly explained what are the imperial interests which require this complete nullification of representative government. * * * To suppose that such a system could work well here implies a belief that the French Canadians have enjoyed representative institutions for half a century without acquiring any of the characteristics of a free people; that Englishmen renounce every political opinion and feeling when they enter a colony, or that the spirit of Anglo-Saxon is utterly changed and weakened among those who are transplanted across the Atlantic.

"It needs no change in the principles of government, no invention of a new constitutional theory, to supply the remedy which would, in my opinion, completely remove political disorders. It needs but to follow out consistently the principles of the British constitution, and introduce into the government of these great colonies those wise provisions by which alone the working of the representative system can in any country be rendered harmonious and efficient.

"The responsibility to the united legislature of all officers of the government, except the governor and his secretary, should be secured by every means known to the

British constitution. The governor * * * should be instructed that he must carry on his government by heads of departments, in whom the united legislature shall repose confidence; and that he must look for no support from home in any contest with the legislature, except on points involving strictly imperial interests."

Lord Durham, whose conception of the power entrusted to him was wider than the letter of his commission warranted, was recalled in 1838. His report was submitted to the queen under date of January 31, 1839. The government decided to act upon it. Mr. Poulett Thompson, a merchant-prince of the Baltic trade, the president of the British board of trade and an economist of the Ricardian school, was sent out to Canada to effect the union of the provinces. On him was conferred, that he might better support the dignity of his office, the title of Lord Sydenham.

Sydenham came to Canada in October, 1839. He caused resolutions in favor of the union of the Canadas to be adopted by the legislature of Upper Canada and the special council of the Lower province. In Upper Canada the reformers welcomed the measure. The tories of the family compact detested it, but it came with the official sanction of the imperial government, and they were hanged in the noose of their own loyalty. In Lower Canada, the French population were universally opposed to the measure. The constitution being in suspense there was no assembly in existence and their opposition was futile. The Act of Union was passed by the Imperial Parliament in 1840. It went into force by proclamation February 10, 1841. The first session of the first parliament ended on September 18, 1841. Lord Sydenham shortly before the close of the session had met with a severe

accident by a fall from his horse. Worn by his arduous labors, he failed to rally from the shock. He died within twenty-four hours of the close of the parliamentary session.

Let us now consider the position in which the question of responsible government stood under this régime. Before the union Lord Sydenham published in the *Upper Canada Gazette* certain instructions he had received from the colonial secretary, Lord John Russell. These were subsequently held by the reformers to constitute a pledge of the introduction of responsible government. The bearing of the despatch is perhaps ambiguous, and can best be judged from the text:[12]

"You will understand and cause it to be generally known," ran the despatch, "that hereafter the tenure of colonial offices, held during her majesty's pleasure, will not be regarded as equivalent to a tenure during good behavior; but that not only will such officers be called upon to retire from the public service, as often as any sufficient motives of public policy may suggest the expediency of that measure, but that a change in the person of the governor will be considered as a sufficient reason for any alterations which his successor may deem it expedient to make in the list of public functionaries—subject, of course, to the future confirmation of the sovereign. These remarks do not extend to judicial offices, nor are they meant to apply to places which are altogether ministerial, and which do not devolve upon the holders of them duties in the right discharge of which the character and policy of the government are directly involved. They are intended rather to apply to the heads of departments than to persons serving as clerks or in similar capacities under them."

[12] Despatch of Lord John Russell, October 18, 1839.

Such were the instructions given to Lord Sydenham. Of his personal views on colonial government and his theory of his own position, his correspondence affords ample evidence. He regarded himself, not as the merely nominal head of the public administration, such as is a colonial governor of a self-governing colony of today, but as the actual directing force of the government. He presumed it to be his mission to act as a pacificator to the troubled colony; to stand above the rival parties and himself to conduct the executive government by the medium of a ministry representing the balanced interests of opposing factions. The following extracts from his correspondence may serve here as illustrative of his attitude. In a private letter to England (December 12, 1839) he writes: "I am not a bit afraid of the responsible government cry. * * * I have told the people that, as I cannot get rid of my responsibility to the home government, I will place no responsibility on the council; that they are a *council* for the governor to consult, but no more. And I have yet met with no 'responsible government' man who was not satisfied with the doctrine. In fact, there is no other theory which has common sense. Either the governor is the sovereign, or the minister. If the first, he may have ministers, but he cannot be responsible to the government at home, and all colonial government becomes impossible. He must therefore be the minister, in which case he cannot be under the control of men in the colony." On the thirty-first of the same month he wrote in regard to the adoption of the union resolutions in the parliament of Upper Canada:

"It has not been without trouble and a prodigious deal of management, in which my House of Commons' tactics stood me in good stead, for I wanted above all things to

avoid a dissolution. My ministers vote against me. So I govern through the opposition, who are truly 'her majesty's.' * * * My officers (ministers), though the best men, I believe, for their departments that can be found, were, unfortunately, many of them, unpopular from their previous conduct, and none of them sufficiently acquainted with the manner in which a government *through* parliament, should be conducted to render me any assistance in this matter. I had, therefore, to fight the whole battle myself. * * * Whoever follows me now may, with management, keep everything quiet, and rule with comfort. * * * What I have seen, however, and had to do in the course of the last three weeks, strengthens my opinion of the absolute necessity of your sending out as my successor some one with House of Commons and ministerial habits, *a person who will not shirk from work, and who will govern, as I do, himself.*"

The conception of the governor's position indicated was entirely contrary to the views of the Canadian reformers. Lord Sydenham had appointed Robert Baldwin to a seat in the executive council (February 4, 1841). In accepting it, Baldwin wrote and published a letter to the governor general in which he said: "I distinctly avow that in accepting office I consider myself to have given a public pledge that I have a reasonably well grounded confidence that the government of my country is to be carried on in accordance with the principles of responsible government, which I have ever held." In the opinion of the reformers, Lord Sydenham's cabinet, constructed as it was of men of opposing opinions, was formed in violation of what they now considered to be the accepted principle of colonial government. The difference of opinion thus created caused a standing dis-

pute between Sydenham and the reformers for the rest of his administration. On the meeting of parliament, Baldwin declared his inability to act in a ministry in which his political opponents were included. On the refusal of Lord Sydenham to reconstruct the ministry, Baldwin resigned. The governor referred to this as his "having got rid of" his solicitor general. A parliamentary wrangle on the principles of the Canadian government (June, 1841) ensued. Mr. Draper, the attorney general, denied the propositions of the reformers, claimed that the functions of the governor were of a "mixed character," but when finally driven to bay admitted the principle of ministerial resignation on an adverse vote.[13]

The reform journals, French and English, cried out that responsible government was won. Meantime, the Draper government and Lord Sydenham endeavored to avoid all further discussion of the question of principle by instituting a programme of practical, useful legislation. The reformers dogged their footsteps with the cry of responsible government. Toward the close of the session (September 3, 1841), a series of resolutions were boldly forced upon the assembly by Baldwin and his colleagues. The resolutions, though modified by the influence of Lord Sydenham, who is said to have drafted their final form, were afterwards viewed by the reformers as a Magna Carta of their liberties. The resolutions in full appear in the journal of the assembly (vol. i, 1841). The most important one may be quoted: "That in order to preserve between the different branches of the provincial parliament, that harmony which is essential to the peace, welfare, and good government of the province,

[13] No official reports of the speeches were made at this time. See speech of Mr. Draper as given in *The Church*, June 26, 1841.

the chief advisers of the representative of the sovereign, constituting a provincial administration under him, ought to be men possessed of the confidence of the representatives of the people, thus affording a guarantee, that the well understood wishes and interests of the people which our gracious sovereign has declared shall be the rule of the provincial government, will, on all occasions, be faithfully represented and advocated."

To Lord Sydenham succeeded Sir Charles Bagot. Bagot was a man well up in years, an aristocrat of the better school, courteous in his address, kindly in disposition, and with an unaffected charm of manner which soon endeared him to those about him. His long experience in the diplomatic service had taught him the value of conciliation. His lack of self assertive egotism disinclined him to play the part of a proconsul. At the time of his arrival in February, 1842, the matter of responsible government in Canada was still an open question. The September resolutions had affirmed it, but it had, as yet, had no practical application. Sir Charles determined to accept the principle as the basis of his government. The Draper ministry, in despite of its policy of good works, lacked the saving grace of popular support. It was almost entirely without French Canadian adherents. Sir Charles accepted the resignation of Draper, and invited the reformers of the two sections of the province to form a ministry. At the head of it, he placed Robert Baldwin and Louis LaFontaine. The latter, a former supporter of Papineau, had stood aloof from the rebellion; after its failure he had rallied the French to a struggle for constitutional reform and had entered into eager correspondence with Baldwin, Hincks, and the Upper Canada reformers. Resigning himself to the Act of the Union,

LaFontaine had urged patriots to seize hold of the principle of responsible government as the means of saving their national integrity, and stood now as the recognized leader of the French Canadian party of reform.[14]

The LaFontaine-Baldwin ministry, jointly English and French, entered office in September, 1842. Its inception marks the first acceptance of the system of dual control in Canada. It marks also the first recognition—not, however, a permanent one—of the principle of responsible government by a governor general of Canada. "Le grand principe de la responsabilité dans le gouvernement," said *La Minerve* of Montreal, "est donc formellement et solonnellement reconnu par le représentant de la couronne, et scellé de l'approbation de l'assemblée legislative. De cette époque date une révolution, qui, pour étre vierge de sang et de carnage, n'en est que plus glorieuse."[15]

The plaudits of *La Minerve* were, however, premature. During his brief tenure of office, Sir Charles Bagot confined himself strictly to the constitutional position of governor as now recognized. But his conduct met scant approbation at the hands of the home authorities. Sir Robert Peel's cabinet were under the standing delusion that reformer and rebel, French Canadian and traitor, were synonymous terms in Canadian politics. Responsible government in Canada meant to them the delivery of the country into the hands of those who would betray it. The correspondence of Sir Robert Peel bears ample witness to this.[16] "The Duke" (of Wellington) wrote Peel to Arbuthnot (October 18, 1842) "has been thunder-

[14] *La Minerve*, September 21, 1842.

[15] *La Minerve*. September 21, 1842.

[16] C. S. Parker: *Sir Robert Peel from his Private Papers*, vol. ii, chap, xiv (London, 1899).

struck by the news from Canada. Between ourselves, he considers what has happened[17] as likely to be fatal to the connection with England." To the colonial secretary, Lord Stanley, Peel wrote under date of October 21, 1842: "Concurring in what you say of the mismanagement of the negotiation by Bagot, and fully sensible of the difficulty of defending his course in itself, I yet see such formidable obstacles to the disavowal of his policy, that I lean to the opinion that we must avow and adopt it." On the same day a letter to Mr. Arbuthnot says: "Whatever may have been done in Canada has been done on the undivided responsibility of Sir Charles Bagot." Four days later, the prime minister wrote to Wellington that for the time being the government must acquiesce in the present status of affairs; but added, "It will remain to be considered afterwards what is to be done with Sir Charles Bagot and his measures."

There is no doubt that, with such a cabinet behind them, the private despatches of Lord Stanley to the governor general became sharply censorious. The text of this private correspondence does not appear to be available nor do the Canadian archives, as far as is known, contain any copies of it. But the current history of the day is full of allusions to the obvious fact of the anxiety and distress of Sir Charles Bagot occasioned thereby. Francis Hincks in his *Reminiscences* does not hesitate to assert that Stanley was determined to overthrow the system of responsible government and to repudiate as soon as possible the step taken by the Canadian governor general. This may be unproven, but it is at any rate consistent with the views expressed in the House of Lords by Stanley as late as 1849 during the debates arising out of the Rebel-

[17] The formation of the LaFontaine-Baldwin ministry.

lion Losses Act passed by the Canadian parliament. On that occasion, Lord Stanley said: "If the principle is laid down that the prime minister of that colony (Canada) is to advise the governor on every occasion, and that his advice is to be explicitly followed—that he must be a man having the control of a majority of the local house of assembly, that he is to advise the governor on all questions including the appointment of members to fill that other branch of the legislature, the legislative council, the result is that the general government—aye, the crown itself, is constituted of one man who has, for the time being, the majority of the house of assembly."[18]

The opportunity, if such Lord Stanley sought, to renounce the policy in regard to responsible government adopted by Sir Charles Bagot, soon presented itself. Bagot like his predecessor succumbed to the arduous cares of his office, and died in Kingston in May, 1843. His successor, Sir Charles Metcalfe, was a man of different mold. He possessed in an eminent degree a self assertive and independent character which would have made it difficult for him in any case to effect the self effacement of a constitutional governor. His experience as governor of Jamaica, and interim governor general of India (1834-36) had scarcely fitted him to adopt the less autocratic rôle of governor general of Canada. His formal instructions from Lord Stanley[19] were, it is true, identical with those given to Sydenham and Bagot. But it is altogether probable that in the private conversation which he held with the colonial secretary before his departure for Canada, he received assurance that he was not expected to subordinate his position to that of his Canadian ministry.

[18] Speech of Lord Stanley, June 13, 1849.

[19] See Report of Canadian Archives, 1906.

Metcalfe, therefore, came to Canada with honest intentions and a conscientious desire to do his duty, but with a large sense of the position and powers he was to enjoy. Like Sydenham, he viewed himself as called upon to modify and indeed to control the play of party strife, to harmonize the animosities of rival factions, and to guide the destinies of the hour. His despatches to Lord Stanley and his private correspondence descriptive of the position of affairs in Canada testify to the rectitude of his intentions and to the interpretation which he put upon his office. Some extracts from a despatch[20] of August 5, 1843, may here be cited:

"My Lord,

Regarding Lord Sydenham as the fabricator of the frame of government now existing in this province, I have read his despatches * * * with attention, in search of some explanation of the precise view with which he gave to the local executive administration its present form * * * I find that in the early portion of his despatches whenever the notion of responsible government is alluded to in the sense in which it is here understood, he scouts it. His view of the responsibility of a colonial governor * * * evidently was that the governor is a responsible government; that his subordinate executive officers are responsible to him, not to the legislative assembly; and that he is responsible to the ministers of the crown and liable to appeals from the colony against his proceedings. It is understood that he was little accustomed to consult his council and that he conducted his administration according to his own judgment.

"The term 'responsible government,'" continues the

[20] See selections from the papers of Lord Metcalfe. J. W. Kaye. London, 1845, pp. 411 et 599.

same despatch, "now in general use in this colony, was derived, I am told, from the marginal notes of Lord Durham's report. * * * From that time, responsible government became the war cry of the [democratic] party. Lord Sydenham had to encounter or submit to this demand. One of his objects was to win the reform party. * * * and they could only be won by the belief on their part that responsible government was to be conceded. In fact, Lord Sydenham, whether intending it or not, did concede it practically by the arrangements which he adopted; although the full extent of this concession was not so glaringly manifested during his administration as in that of his successor."

"There appears to me to have been a great difference between the sort of responsible government intended by Lord Durham and that carried into effect by Lord Sydenham. On examining Lord Durham's report * * * I find that he proposes that all officers of the government, except the governor and his secretary, should be responsible to the united legislature; and that the governor should carry on his government by heads of departments in whom the united legislature repose confidence. All this might be done without impairing the usefulness of the governor. If the secretary who issued the governor's orders were not responsible to the legislature, there would be a great difference from the present arrangement under which the provincial administration is carried on through secretaries professedly so responsible. The general responsibility of heads of departments, acting under the order of the governor, each distinctly in his own department, might exist without the destruction of the former authority of her majesty's government. In this scheme there is no mention of the combination of these officers in

a council to act bodily with the character of a cabinet, so as manifestly to impair the powers of the responsible head of the government."

Such was Metcalfe's theory of the administration—a government by departments with a real, not a nominal, governor at its head. His view of the relation which it established between himself and the political parties of Canada appears in the same despatches. "I will endeavor," he wrote to Stanley, "to describe my own position. I am not perfectly satisfied with my council, chiefly because they are under the influence of party views, and would, if they could, drag me on with them in the same course. The only effectual remedy would be to dismiss them or such of them as are most in the extreme on this point, and form another council. But the consequence to be expected would be that a cry would be raised against me of hostility to responsible government. * * * My objects are to govern the country for its own welfare and to engage its attachment to the parent State. In these purposes it is my wish to conciliate all parties, * * * but the accomplishment of that wish seems almost impossible when the governor is trammeled with a council deeming it necessary for their existence that their own party alone should be considered. * * * The form of administration adopted by Lord Sydenham appears to me to have put heavy shackles on any governor who means to act with prudence and would not recklessly incur the consequences of a rupture with the majority in the popular assembly."

Nor did Metcalfe conceal the fact that, of existing parties, he preferred the tories. At an earlier date (April 25, 1843) he had written to the colonial secretary—"I am persuaded that the firmest adherents to British con-

nexion are the main body of the conservative party. Under these circumstances, and with much more sympathy in my own heart toward those who have been loyal than toward those who have been disposed to throw off the dominion of the mother country, I find myself condemned as it were to carry on the government to the utter exclusion of those on whom the mother country might confidently rely in the hour of need. This exclusion is contrary to my inclination, and, in my opinion, much to be deprecated."

Such being the position and feelings of Sir Charles Metcalfe, a rupture with the LaFontaine-Baldwin cabnet was inevitable. Indeed, the governor general himself, in a letter to Lord Stanley in the summer of 1843, openly stated that a rupture "must come sooner or later." It came at the close of the year. The persistent refusal of Metcalfe to permit to the cabinet a full control of appointments to office, led to the collective resignation (with one exception) of the reform ministry on November 26, 1843. The precise view put upon the situation by Metcalfe and by his cabinet is found in an official communication addressed by LaFontaine to Sir Charles Metcalfe and in the reply thereto. Both of these documents were submitted to the legislature and appear printed in full in the journal of the assembly.[21] The communications are too long for citation in full. The most important sections of each run as follows:

Statement of Mr. LaFontaine: "Mr. LaFontaine in compliance with the request of the governor general, and in behalf of himself and his late colleagues, who have felt it to be their duty to tender a resignation of office, states, for his excellency's information, the substance of the

[21] Journal of the Legislative Assembly, December 1, 1843.

explanation which they propose to offer in their places in parliament.

"They have avowedly taken office upon the principle of responsibility to the representatives of the people in parliament, and with a full recognition on their parts of the following resolutions, introduced into the legislative assembly with the knowledge and sanction of her majesty's representative in this province, on the third of September, 1841.

"They have lately understood that his excellency took a widely different view of the position, duties, and responsibilities of the executive council, from that under which they accepted office. * * *

"Had the difference of opinion between his excellency and themselves, and, as they have reason to believe, between his excellency and the parliament and people of Canada, generally, been merely theoretical, the members of the late executive council might and would have felt it to be their duty to avoid any possibility of collision, which might have a tendency to disturb the tranquil and amicable relations which apparently subsisted between the executive government and the provincial parliament. But that difference of opinion has led, not merely to appointments to office against their advice, but to appointments and proposals to make appointments, of which they were not informed in any manner until all opportunity of offering advice respecting them had passed by, and to a determination on the part of his excellency to reserve for the expression of her majesty's pleasure thereon, a bill, introduced into the provincial parliament with his excellency's knowledge and consent as a government measure, without an opportunity being given to the members of the executive council to state the probability

of such a reservation. They, therefore, felt themselves in the anomalous position of being, according to their own avowals and solemn public pledges, responsible for all the acts of the executive government to parliament, and, at the same time, not only without the opportunity of offering advice respecting these acts, but without the knowledge of their existence, until informed of them from private and unofficial sources."

Statement of Sir Charles Metcalfe: "On Friday, Mr. LaFontaine and Mr. Baldwin came to the government house, and after some other matters of business, and some preliminary remarks as to the cause of their proceeding, demanded of the governor general that he should agree to make no appointment, and no offer of an appointment, without previously taking the advice of the council; that the lists of candidates should in every instance be laid before the council; that they should recommend any others at discretion, and that the governor general in deciding after taking this advice, should not make any appointment prejudicial to their influence. In other words, that the patronage of the crown should be surrendered to the council for the purchase of parliamentary support; for, if the demand did not mean that, it meant nothing, as it cannot be imagined that the mere form of taking advice without regarding it was the process contemplated.

"The governor general replied, that he would not make any such stipulation, and could not degrade the character of his office, nor violate his duty, by such a surrender of the prerogative of the crown.

"He at the same time objected, as he always had done, to the exclusive distribution of patronage with party views, and maintained the principle that office ought, in

every instance, to be given to the man best qualified to render service to the State, and where there was no such preëminence, he asserted his right to exercise his discretion."

To this may be appended the following extract from a private letter sent by Metcalfe to Stanley on December 11, 1843, the manuscript of which is in the Canadian archives. "Late on the following day Mr. LaFontaine sent me a written statement of the explanation which he and his colleagues proposed to give in their places in Parliament, of the grounds of their resignation. It is a most disingenuous production, suppressing entirely the immediate matter on which their resignation took place and trumping up a vague assertion of differences on the theory of responsible government as applicable to a colony, which had been expressed in the freedom of conversation as matters of opinion but not as grounds of procedure and were, therefore, very unfairly used for the purpose to which this misrepresentation was applied. Had the gentlemen openly avowed that their object was to make the council supreme and to prostrate the British government and reduce the authority of the governor to a nullity, there would have been truth in their statements of a difference between us, as I can never admit that construction of responsible government in a colony."

In the Canadian assembly the majority refused to accept the arguments of the governor. A resolution[22] (December 9, 1843) was adopted, supporting the action of the late cabinet and declaring that the governor had forfeited the confidence of the house. The resignation of the ministry in November, 1843, precipitated a crisis in Canadian affairs. Of the late cabinet only one member,

[22] Journal of the Legislative Assembly, December 9, 1843.

Mr. Daly—who had served in various governments and was known as the "permanent secretary"—remained in office. Metcalfe summoned Mr. Draper to his aid but was unable to form a cabinet. French Canadian support, save for the adhesion of Mr. Viger, an old-time patriot of the pre-rebellion agitation, was entirely lacking. For the next six months Metcalfe remained without a ministry and, in the eyes of the reformers, governed in defiance of the Constitution.

Meantime the country seethed with agitation. The Reform Association, established at Toronto in the opening of 1844, organized a campaign of meetings and banquets at which the words "responsible government" were shouted abroad as the alpha and omega of Canadian liberalism. French Canada rallied solidly to the support of LaFontaine and a storm of opposition howled about the ears of the governor general. Metcalfe, firm in his sense of rectitude, braced himself squarely on his feet. But he had no need to stand alone. The tories thus happily restored to their old time position of the defenders of the royal prerogative, rallied to the governor's side. The interest of the Anglican church was thrown into the scale. Platform and pulpit resounded to the eloquence of rival orators while in the pamphlet war which broke out, *Zeno Legion*, and a swarm of writers, anonymous and otherwise, delivered thrust and counterthrust with unabated fury. It is quite impossible to reproduce here any of the arguments of the Canadian pamphleteers. But the defense of Sir Charles Metcalfe by Egerton Ryerson, *La Crise ministérielle* by Mr. Viger and more than all, the *Letters on Responsible Government* by Robert Baldwin Sullivan, writing under the name of "Legion" may be read with interest. All of these and many other documents of the period are

preserved among the Baldwin pamphlets in the Toronto Public Library.

Metcalfe, casting aside the thin shadow of neutrality which still clung to him threw himself into the struggle. His relations with the two leaders of his late cabinet had become those of intense personal animosity. In his official answers to audiences and petitions, he did not hesitate to denounce them. The reformers, on their part, directed their attacks no longer against their political opponents, but straight against the governor himself. "Old square toes," as they called him, was denounced as the very embodiment of tyranny. On the other side, the tories adroitly endeavored to shift the issue to one of loyalty versus treason, of British connection versus annexation, of monarchy versus republic. The old flag was flaunted on the hustings and the tail of the British lion lashed furiously at the sides of that most available beast.

Meantime in England the government of Sir Robert Peel supported Metcalfe. Stanley, speaking in Parliament on February 2, 1844, declared that the government entirely approved of the conduct of Sir Charles Metcalfe, and in a speech of May 30, 1844, denounced the LaFontaine-Baldwin party in no measured terms.

Stanley's private despatches to Metcalfe are not preserved. It was understood in the colony that they were strongly in support of the governor general. There is, in the manuscript collection of Baldwin letters in the Toronto Public Library, a letter from LaFontaine, dated January 28, 1844, in which the writer states that M. T. H. Dunn had told him of a communication just received from the colonial secretary entirely endorsing the governor's conduct. "This," says LaFontaine, "is a matter of course."

In British political circles the strongest sympathy with

the Canadian reform party came from the radicals of the school of Roebuck and Hume. These and their associations had been consistently in favor of what they considered Canadian liberty, had corresponded with William Lym Mackenzie in the rebellion period, and now espoused the cause of the cabinet against the governor. It must, however, be noted that between the Canadian reformers of the Baldwin group and the English radicals a great gulf was fixed. The latter were partisans of a little England and a restricted empire. To them, colonial autonomy was a half way house to colonial independence. To the reformers, on the other hand, colonial self government was the only true safeguard of imperial stability. This amply appears in the public utterances of Robert Baldwin during the years under consideration. In the debates in Sydenham's parliament, already mentioned, he said in reply to Mr. Draper: "I will never yield my desire to preserve the connection between this and the mother country, and although it is said that a period will arrive demanding a separation, I, for my part, with this principle [responsible government] that has been avowed, being acted on, cannot subscribe to that opinion. If a conciliating policy were adopted toward all the people of this country such an opinion could have no existence.[23] This view was repeated again and again by Baldwin and his associates in their campaign against Metcalfe.[24]

If the general election which ensued in the autumn of 1844 be taken as a criterion, Metcalfe was victorious against his opponents. But the majority remained in support of Mr. Draper, and the new cabinet, appointed in August, was of the narrowest. The elections had been

[23] Speech in the Assembly, September 13, 1842. Kingston *Chronicle and Gazette*, September 17, 1842. No official reports of speeches were made.

[24] See, for example, Speeches of the Meetings of the Reform Association.

the scenes of riot and intimidation. The reformers lost the election, fought on the issue of responsible government, but the principle for which they fought was henceforth practically acknowledged. The Draper government maintained itself in power only by resorting to all the arts at the disposal of the consummate politician who, under Sir Charles Metcalfe, was at its head. It existed in a state of unstable equilibrium, painfully balanced between its desire to maintain its conservative following and its anxiety to gain French Canadian support. The imperial government recognized the services of the governor general by creating him in the autumn of 1844 Baron Metcalfe of Fern Hill. But the fate of Durham, Sydenham, and Bagot was upon him and earthly honors came too late. A distressing malady from which he had suffered for some years now assumed a fatal complexion. Official business became impossible and on the twenty-sixth of November, 1845, Lord Metcalfe left Canada to die. "I need hardly say," Lord Stanley[25] had written him toward the close of his régime, "that your administration of affairs in Canada has more than realized the most sanguine expectations which I had ventured to form of it."

After Metcalfe came Lord Cathcart, a military man interested in the Oregon boundary dispute and the prospect of fighting the United States, but with neither interest nor intention of interfering with internal government. Meantime, the Draper government, repeatedly defeated in the house, tottered to its fall, and with the signing of the Oregon treaty, the need for a military government passed away. Lord Cathcart resigned his office, and in 1847 (January 20), Lord Elgin, the new governor general, landed in Halifax.

[25] Stanley to Metcalfe, November 2, 1844.

The administration of Lord Elgin marks the acceptance by the governor general and the imperial authorities of the principle of colonial self-government as now understood. The period between Metcalfe's victory at the election of 1844 and the arrival of Lord Elgin in 1847, stands as an interregnum in the struggle. The reformers had never ceased in and out of parliament to advocate the doctrine of responsible government. Lord Elgin, supported by the new liberal government with Earl Grey as colonial secretary, was willing to concede it.

The opinions of Elgin and Grey on responsible government may be said to represent a complete acceptance of the colonial doctrine. The English liberals had learned wisdom from the protracted difficulties of Canadian administration. Lord John Russell himself was willing to forget his emphatic denial of the possibility of colonial responsible government uttered in 1836. Lord Grey belonged to a family rendered illustrious in the annals of liberalism by his father's triumph in the reform agitation of 1832. Lord Elgin, newly married to a daughter of Lord Durham, had a chivalrous interest in being the first to apply in their full extent the principles enunciated in the report of that distinguished nobleman.

A glance at the correspondence of Lord Elgin shows the constitutional position which he was prepared to assume. "I have adopted," he wrote to Lady Elgin[26] (January 31, 1847) "frankly and unequivocally Lord Durham's view of government, and I think that I have done all that could be done to prevent its being perverted to vile purposes of faction." "I still adhere to my opinion that the real and effectual vindication of Lord Durham's mem-

[26] T. Walrond: *Letters and Journals of James, Eighth Earl of Elgin*, p. 36. London, 1872.

ory and proceedings will be the success of a governor general who works out his views of government fairly." "I give to my ministers," Elgin wrote to Lord Grey,[27] "all constitutional support, frankly and without reserve and the benefit of the best advice that I can afford them in their difficulties. In return for this I expect that they will, in so far as it is possible for them to do so, carry out my views for the maintenance of the connexion with Great Britain and the advancement of the interests of the province. On this tacit understanding, we have acted together harmoniously up to this time, although I have never concealed from them that I intend to do nothing which may prevent me from working cordially with their opponents, if they are forced upon me. That ministries and oppositions should occasionally change places is of the very essence of our constitutional system, and it is probably the most conservative element which it contains. By subjecting all sections of politicians in their turn to official responsibilities, it obliges heated partisans to place some restraint on passion, and to confine within the bounds of decency the patriotic zeal with which, when out of place, they are wont to be animated. In order, however, to secure these advantages, it is indispensable that the head of the government should show that he has confidence in the loyalty of all the influential parties with which he has to deal, and that he should have no personal antipathies to prevent him from acting with leading men. I feel very strongly that a governor general, by acting upon these views with tact and firmness, may hope to establish a moral influence in the province, which will go far to compensate for the loss of power consequent on the surrender of patronage to an executive responsible to the

[27] Walrond: *Op. cit.*, p. 40.

local parliament. Until, however, the functions of his office, under our amended colonial constitution, are more clearly defined—until that middle term which shall reconcile the faithful discharge of his responsibility to the imperial government and the province with the maintenance of the quasi-monarchical relation in which he now stands toward the community over which he presides, be discovered and agreed upon, he must be content to tread along a path which is somewhat narrow and slippery, and to find that incessant watchfulness and some dexterity are requisite to keep him from falling, on the one side into the *néant* of mock sovereignty, or on the other into the dirt and confusion of local factions."

The views entertained by the British cabinet were such as to lead them to endorse Lord Elgin's attitude. The prime minister, indeed, Lord John Russell, seems to have undergone a gradual change of opinion in colonial government, for the tenor of his speech of 1836 and his despatch of October 16, 1839,[28] to Lord Sydenham do not entirely coincide with the official colonial policy of his cabinet of this later date. Lord Grey, however, insisted on interpreting Lord John Russell's previous opinions in a sense altogether favorable to the amended and enlarged view of colonial responsibility which the government were now prepared to accept. This attempt to reconcile the prime minister's earlier and later attitude does not seem altogether successful. "In two despatches addressed to Mr. Poulett Thompson on the fourteenth and sixteenth of October, 1839," Lord Grey wrote in his letters to Lord John Russell,[29] "you pointed out the necessary distinc-

[28] House of Commons Sessional Paper, No. 621, 1848. pp. 3–6.

[29] See *The Colonial Policy of Earl Russell's Administration.* Earl Grey. London, 1854, vol. i, pp. 202, *et seq.*

tions between the government of this country and that of a colony; but at the same time you have observed that, while you saw insuperable objections to the adoption of the principle of the responsibility of the local government to the assemblies in the manner in which it had been stated in the colonies, you saw none to the practical views of colonial government recommended by Lord Durham, as you yourself understood them; and you announced that for the future the principal offices of the colonial governments in North America would not be considered as being held by a tenure equivalent to one during good behavior, but that the holders would be liable to be called upon to retire whenever, from motives of public policy or for other reasons, this should be found expedient. You explained that this rule was to be applicable without limitation to persons appointed to the offices in question subsequently to the date of your despatch, and to the existing holders of office so far as was clearly necessary for the public good; but at the same time with due regard to the fair expectations of individuals, to whom pecuniary compensation should be awarded when it might appear unjust to dispense with their services without such an indemnity. Up to July, 1846, the problem of bringing into satisfactory operation this system of administration had certainly not been solved. * * * When the union was accomplished, the state of the country was still such as to prevent the French Canadians from acquiring their just weight in the house of assembly elected for the first parliament of the provinces; and the circumstances of the time, together with his own talents for business, combined to give Lord Sydenham great influence over the legislature, and to render it necessary for him to take upon himself a larger personal share of the administration of affairs than

would have fallen to him according to the strict theory of the Constitution. * * * His successor, Sir C. Bagot [made] * * * a much nearer approach to the establishment of a really constitutional system. * * * A difference of opinion arose between Lord Metcalfe and his council upon a question relating to the distribution of patronage into which it is neither necessary nor expedient that I should enter. * * * Lord Metcalfe obtained * * * the support of a new assembly but this was only accomplished by Lord Metcalfe's personal popularity and influence, which were employed to procure the return of members favorable to his policy; the effect of this was to place him in direct hostility to one of the great parties into which the colony was divided."

Lord Grey's despatches to the colonies clearly indicate the constitutional position which he expected the colonial governors to adopt. In his work upon Colony Policy he cites a despatch[30] sent to Governor Harvey of Nova Scotia, in which colony, though in a lesser degree than in Canada, the matter of responsible government had been a standing issue.[31] This despatch, as Lord Grey himself has said, offers the "best explanation" of his views.

"Of whatever party your council may be composed, it will be your duty to act strictly upon the principle you have yourself laid down, in the memorandum delivered to the gentlemen with whom you have communicated, namely, 'of not identifying yourself with any but one party,' but, instead of this, 'making yourself both a mediator, and a moderator between the influential of all

[30] See House of Commons Sessional Papers, No. 621. 1848.

[31] See J. Longley's *Joseph Howe, Makers of Canada Series.* Morang & Co., Toronto.

parties.' In giving, therefore, all fair and proper support to your council for the time being, you will carefully avoid any acts which can possibly be supposed to imply the slightest personal objection to their opponents and also refuse to assent to any measures which may be proposed to you by your council, which may appear to you to make an improper exercise of the authority of the crown for party rather than for public objects. In exercising, however, this power of refusing to sanction measures which may be submitted to you by your council, you must recollect that this power of opposing a check upon extreme measures proposed by the party for the time in the government, depends entirely for its efficacy upon its being used sparingly and with the greatest possible discretion. A refusal to accept the advice tendered to you by your council is a legitimate ground for its members to tender to you their resignation—a course they would doubtless adopt should they feel that the subject on which a difference had arisen between you and themselves was one upon which public opinion would be in their favor. Should it prove to be so, concession to their views must sooner or later become inevitable, since it cannot be too distinctly acknowledged that it is neither possible nor desirable to carry on the government of any of the British provinces in North America in opposition to the opinion of the inhabitants."

Commenced under such auspices, Lord Elgin's administration was evidently destined to denote the inauguration of real self-government. Nor had he been long in office before a test case of such magnitude presented itself that Lord Elgin was enabled to establish once and for all a precedent against British interference in local affairs. Shortly after Lord Elgin's coming, the Draper govern-

ment sought to strengthen itself by getting rid of Mr. Draper. The conservative coalition—the Sherwood Daly ministry of May, 1847—proved equally unstable. No French Canadian support was forthcoming and the repeated defeats of the ministry in the assembly in the session of June and July, 1847, made it evident that an entire change was necessary. When the next session opened at Montreal in February, 1848, the overwhelming defeat of the ministers on the address by a vote of fifty-four to twenty drove them out of office. Lord Elgin called upon LaFontaine and Baldwin to form an administration.

This second LaFontaine-Baldwin administration has been called in Canadian history the "great ministry." The record of its achievements in the history of the provincial education, municipal government, and the building of Canadian railways belongs elsewhere. In the present connection, the central point of interest is found in the Rebellion Losses Bill which formed the great test of the principle of responsible government and whose passage in 1849 renders that year the real date to which the definite establishment of colonial self-government is to be assigned. The Rebellion Losses Bill was a measure to "provide for the indemnification of parties in Lower Canada whose property was destroyed during the rebellion in the years 1837 and 1838." It evoked from the tories an outburst of opposition that almost culminated in a revolt. Although only extending to Lower Canada a policy already adopted towards the upper section of the province, the bill was denounced as equivalent to rewarding rebels for their own rebellion. The bill was supported by a strong majority in the house, but the tories urged Lord Elgin to intervene. Lord Elgin in-

sisted upon maintaining his purely constitutional attitude. He refused to regard the members of the majority who passed the bill as a mere majority of traitors. His assent to the bill given in April, 1849, was the signal for a wild outbreak in Montreal. The great meeting of protest called in the Champ de Mars ended in riot. The parliament buildings went up in flames. The governor general was mobbed and pelted in the streets. Only the use of military force sufficed to quell the passions of the hour. Deputations from the tory party were sent to England to urge the disallowance of the bill by the interposition of the royal prerogative. Lord Grey defended the rights of colonial autonomy in the House of Peers; Lords Stanley, Brougham, Lyndhurst[32] and others denied the application of such principles in the present instance. In the Commons, Mr. Gladstone urged the disallowance of the bill.[33] The imperial government refused to interfere. The rebellion predicted by the tories did not occur, and, from then on, the right of the Canadian parliament to legislate on matters affecting Canada was admitted as a cardinal principle of colonial policy.

The part played by Lord Elgin in this final stage of the recognition of colonial self-government cannot be too highly estimated. "I am prepared" he said at the time of the riots in Montreal, "to bear any amount of obloquy that may be cast upon me, but if I can possibly prevent it, no stain of blood shall rest upon my name." The assent given by Lord Elgin to the bill was given with a full sense of the critical constitutional question involved. "I considered," he said, "that by reserving the bill, I should only have cast on her majesty and her majesty's

[32] Speeches of June 19, 1849.

[33] Speech of Mr. Gladstone, June 14, 1849.

advisers a responsibility which ought, in the first instance at least, to rest upon my own shoulders, and that I should awaken in the minds of the people doubts as to the sincerity with which it was intended, that constitutional government should be carried on in Canada; doubts which in my firm conviction, if they were to obtain generally, would be fatal to the connection."

Three years after the date of the Rebellion Losses Bill, when all agitation had subsided, Lord Elgin wrote to a personal friend: "I have been possessed with the idea that it is possible to maintain on this soil of North America and in the face of republican America, British connection and British institutions, if you give the latter freely and unsparingly."

THE JAPANESE SCHOOL QUESTION AND THE TREATY-MAKING POWER

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The Japanese protest of October 23, 1906, against the action of the San Francisco board of education, based on a California statute requiring all children of Mongolian descent to attend the school set apart for orientals, is one of the most puzzling incidents in our recent diplomatic history. It was sufficiently perplexing to the friends and admirers of Japan to learn that her government had created an international issue out of such a trivial matter as the segregation of less than one hundred Japanese pupils in the oriental school of San Francisco. But some of the friends and supporters of the administration were still more surprised to hear that the federal government admitted that the treaty of 1894 with Japan had been violated by this action of the San Francisco board of education, and apparently believed that it had jurisdiction in the premises.

It is true that Secretary Metcalfe's report, which was published on December 19, 1906, also informed us of a considerable number of assaults on Japanese subjects by "hoodlums and roughs," and of the breaking of windows in Japanese restaurants in San Francisco. These attacks, although subsequent to the earthquake, occurred at a time of great public disorder during which there appears to have been a carnival of crime when the police were powerless to protect life and property; but they seem to

have been directed against the Japanese from motives of race prejudice, and not for the purpose of robbery.

Leaving out of question the slight boycott against Japanese restaurants during the month of October, it must be admitted that the government of Japan had ample cause of complaint, if not, indeed, for a demand for indemnity, in the attacks on Japanese property and in the assaults on Japanese subjects committed during the months of April to November, 1906.

The general principle of international law underlying this matter is that in times of riot, disorder, insurrection, or civil war, foreigners are merely entitled to the same kind and degree of protection as is afforded to a State's own citizens or subjects. But it is also now generally admitted that a government is liable for injuries to aliens resulting from attacks upon foreigners as such or upon those of a particular nationality, wherever the local authorities are unable or unwilling to use due (*i. e.*, reasonable) diligence to prevent, and whenever the courts are unable or unwilling to punish such crimes. It is true that the government of the United States has always refused to admit such liability in principle, but it is also true that in the majority of actual cases our government has granted compensation as a matter of grace and equity, or from a sense of sympathy, policy, or benevolence. This was notably the attitude of our government in the cases of the anti-Spanish riots at New Orleans and Key West in 1851; the anti-Chinese riot at Rock Springs, Wyoming, in 1885; and the Italian lynchings at New Orleans in 1891. The government of the United States has shown commendable zeal in protecting its citizens from such attacks abroad, and other nations are in the habit of requesting compensation in similar cases.

"In attempting to secure redress or justice, aliens must, however, in the first instance, have recourse to the local tribunals of the district in which they are domiciled, or, as Vattel puts it, to the 'judge of the place.' Judicial remedies should, as a rule, be exhausted before resorting to diplomatic interposition for means of procuring redress. But this rule does not apply in case of a gross or palpable denial of justice; where local remedies are wanting or insufficient; where judicial action is waived; where the action complained of is in violation of international law; or where there is certain to be undue discrimination against foreigners. It does not 'apply to countries of imperfect civilization, or to cases in which prior proceedings show gross perversion of justice.'"[1]

It will thus be seen that a diplomatic protest at such an early stage of the controversy would have been an unusual mode of procedure, even supposing that the action complained of had been an injury to person or destruction of property of Japanese subjects. But the Japanese government does not appear to have based its protest of October 23 on this ground. It claimed that the treaty rights of the Japanese had been infringed upon by the action of the San Francisco board of education in ordering the segregation of all Japanese pupils in a separate school set apart for orientals.

It may be observed in the first place that even total exclusion of aliens from school privileges would in itself in no wise constitute a violation of international law. In the absence of treaty stipulations, a State is under no

[1] Mr. Evarts, Secretary of State, to Mr. Marsh. Wharton's Digest iii p. 695. The whole paragraph is a citation from an article by the writer on "The Calvo and Drago Doctrines" in the *American Journal of International Law* (vol. i, p. 32) to which the reader is referred for a fuller discussion of these points with a citation of authorities.

international obligation to extend to foreigners the enjoyment of civil and private rights or to place them upon an equal footing with its own nationals in these respects. Whatever rights and privileges of this sort, whether of an educational, economic, or religious nature, foreigners may enjoy, are based on convention or the principle of reciprocity, or are granted as a matter of grace and favor. All that aliens who are permitted to reside on foreign territory (and this permission is purely optional in the absence of treaty stipulation) can demand as a matter of strict right in international law is the same kind and degree of protection of person and property that nationals enjoy, and free access to the courts to secure such protection.

But it is claimed by Japan—and the claim seems to have been largely admitted in this country—that by virtue of the treaty of 1894 the Japanese were entitled, not merely to such protection, but to the same school privileges as citizens of the United States.

It is true that the treaty of 1894 grants to Japanese residing or domiciled in this country certain reciprocal rights and privileges relating to residence and travel; to the possession, succession and transfer of property, etc.; but there is no mention of school privileges. The following provisions of the treaty of 1894 have been cited in support of the Japanese contention:

ARTICLE I. The citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel, or reside in any part of the territories of the other contracting party, and shall enjoy full and perfect protection for their persons and property.

They shall have free access to the courts of justice in pursuit and defense of their rights; they shall be at liberty

equally with native citizens or subjects to choose and employ lawyers, advocates, and representatives to pursue and defend their rights before such courts, and in all other matters connected with the administration of justice they shall enjoy all the rights and privileges enjoyed by native citizens or subjects.

In whatever relates to rights of residence and travel; to the possession of goods and effects of any kind; to the succession to personal estate, by will or otherwise, and the disposal of property of any sort and in any manner whatsoever which they may lawfully acquire, the citizens or subjects of each contracting party shall enjoy in the territories of the other the same privileges, liberties, and rights, and shall be subject to no higher imposts or charges in these respects than native citizens or subjects or citizens or subjects of the most favored nation. * * *

ARTICLE II. There shall be reciprocal freedom of commerce and navigation between the territories of the two high contracting parties. * * *

It is, however, understood that the stipulations contained in this and the preceding article do not in any way affect the laws, ordinances and regulations with regard to trade, the immigration of laborers, police and public security which are in force or which may hereafter be enacted in either of the two countries.

ARTICLE XIV. The high contracting parties agree that, in all that concerns commerce and navigation, any privilege, favor, or immunity which either high contracting party has actually granted, or may hereafter grant, to the government, ships, citizens, or subjects of any other State, shall be extended to the government, ships, citizens, or subjects of the other high contracting party, gratuitously, if the concession in favor of that other

State shall have been gratuitous, and on the same or equivalent conditions if the concession shall have been conditional; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other upon the footing of the most favored nation.

It is difficult to see how any clause in this treaty can be stretched to cover the Japanese contention. As Senator Rayner observed in his speech in the United States senate on December 12, 1906: "There is not a clause or a line of this treaty that contains by expression or intendment the slightest reference to the public school systems of any of the States of the Union, or confers any rights whatever upon the citizens of Japan to enjoy the privileges of their public educational institutions. There is not a clause or a line, although I understand that the president has been advised to the contrary, that, to the professional mind, would admit of such a construction. The most liberal interpretation of any of its terms does not allow such an interpolation or insertion to be made. The treaty does not even contain the most favored nation clause, except in reference to the particular objects that are therein specifically enumerated."

The Burlingame treaty of 1868 with China, contains an article (Art. VII.) which provides for reciprocal school privileges in all "public educational institutions under the control of the governments of China and the United States;" but it is obvious that the school privileges acquired by the Chinese in the United States as a consequence of this treaty were not extensive. At any rate, this provision in the treaty with China has not prevented the segregation of Chinese school children in the oriental school of San Francisco. Nor can it be claimed that it gives the Japanese any educational privileges by virtue

of the most favored nation clause, for that clause is specifically restricted to matters relating to residence and travel, property, and to trade and navigation. Besides, it "does not cover privileges granted on the condition of a reciprocal advantage."[2]

It has been suggested that the right of education might possibly be included under the right of residence, but this is a forced extension of the meaning of the word residence, for which, so far as the writer is aware, there is no authority whatever. It has been held that the right of residence necessarily implies the right to live and labor for a living (Baker v. City of Portland, U. S. Circuit Court, 1879, 5 Sawyer 566, 570), but it has also been held that such right to live and labor does not prevent the municipal regulation of public laundries. (Barbier v. Connolly, 1885, 113 U. S. 27.)

Special attention should be called to the fact that Article II. of the treaty provides that the previous stipulations do not "affect the laws, ordinances, and regulations with regard to trade, the immigration of laborers, police and public security" which were then in force or which might thereafter be enacted. The police powers of the State and federal government as well as the right to regulate immigration were thus expressly reserved.

But it seems to have been assumed by those who favored the Japanese contention that in some mysterious way and for some unexplained reason the treaty cited above confers school privileges in the States upon the Japanese. Even if this were the case, it by no means follows that such a provision would be constitutional or that, if constitutional, Japanese children could not be

[2] On the meaning and interpretation of the most favored nation clause, see Moore's *Digest of International Law*, v, §765.

segregated in separate schools. The children of our own colored citizens are thus separated in many localities (in the northern as well as the eastern States), and the right thus to segregate the two races has been upheld by numerous decisions of State courts and has been approved by the Supreme Court of the United States (see Plessy v. Ferguson, 1896, 163 U. S. 537, and the cases there cited). And it can scarcely be maintained that aliens enjoy greater privileges than our own citizens in these respects.

It is well known that students of the Constitution of the United States have always been divided into two opposing parties—the broad constructionists and the strict constructionists. These schools have always differed in fundamental attitude toward the Constitution as well as in mode of construction and interpretation. This difference is also manifest in their attitude toward the question of the extent and scope of the treaty-making power.

The opinion of those who hold that the treaty-making power of the United States is practically unlimited is perhaps best expressed by Charles Henry Butler (*Treaty-Making Power of the United States*, vol. i, pp. 5-6):

"*First:* That the treaty-making power of the United States, as vested in the central government, is derived not only from the powers expressly conferred by the Constitution, but that it is also possessed by that government as an attribute of sovereignty, and that it extends to every subject which can be the basis of negotiation and contract between any of the sovereign powers of the world, or in regard to which the several States of the Union themselves could have negotiated and contracted if the Constitution had not expressly prohibited the States from exercising the treaty-making power in any manner

whatever and vested that power exclusively in, and expressly delegated it to the federal government.

"*Second:* * * * That the power of the United States to enter into treaty stipulations in regard to all matters, which can properly be the subject of negotiation between sovereign States, is practically unlimited, and that in no case is the sanction, aid or consent of any State necessary to validate the treaty or to enforce its provisions.

"*Third:* That the power to legislate in regard to all matters affected by treaty stipulations and relations is coextensive with the treaty-making power, and that acts of congress enforcing such stipulations which, in the absence of treaty stipulations, would be unconstitutional as infringing upon the powers reserved to the States, are constitutional, and can be enforced, even though they may conflict with State laws or provisions of State constitutions.

"*Fourth:* That all provisions in State statutes or constitutions which in any way conflict with any treaty stipulations, whether they have been made prior or subsequent thereto, must give way to the provisions of the treaty, or act of congress based on and enforcing the same, even if such provisions relate to matters wholly within State jurisdiction."

On the other hand, the views of the strict constructionists find their best expression in a report from the house judiciary committee bearing on the treaty of reciprocity with the Hawaiian Islands in 1887, prepared by John Randolph Tucker (see House Doc. of 49th Congress, 2d Session, March 3, 1887, Report No. 4177, pp. 4-5):

"The language of the Constitution of the United States which gives the character of 'supreme law' to a treaty, confines it to 'treaties made under the authority of the

United States.' That authority is limited and defined by the Constitution itself. The United States has no unlimited, but only delegated authority. The power to make treaties is bounded by the same limits which are prescribed for the authority delegated to the United States by the Constitution. To suppose that a power to make treaties with foreign nations is unlimited by the restraints imposed on the power delegated to the United States would be to assume that by such treaty the Constitution itself might be abrogated and the liberty of the people secured thereby destroyed. The power to contract must be commensurate with and not transcend the powers by virtue of which the United States and their government exist and act. It cannot contract with a foreign nation to do what is unauthorized or forbidden by the Constitution to be done. The power to contract is limited by the power to do. (3 Story, *Com. on Const.*, §1501.)

"It is on this principle that a treaty can not take away essential liberties secured by the Constitution to the people. The treaty power must be subordinate to these. A treaty cannot alien a State or dismember the Union, because the Constitution forbids both.

"In all such cases the legitimate effect of a treaty is to bind the United States to do what they are competent to do and no more. The United States by treaty can only agree with another nation to perform what they have authority to perform under the constitutional charter creating them. The treaty makes the nexus which binds the faith of the Union to do what their Constitution gives authority to do. A treaty made under that authority may do this; all it attempts to do beyond it is *ultra vires*—is null, and cannot bind them."

The time for pronouncing upon the relative merits of the theories or doctrines of these opposing schools of constitutional construction seems to have passed, for the broad constructionists appear to have practically won the battle all along the line. Although an act of congress renders a prior inconsistent treaty null and void, it has been held again and again both by State and federal courts (including the Supreme Court of the United States) that any treaty made "under the authority of the United States," is "the supreme law of the land," and that the "judges in every State" are "bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

The strongest cases in support of this contention are those in which it has been held that State laws which interfere with the rights of aliens to hold and transmit real property are null and void when such rights have been granted by treaty (see Chirac v. Chirac, 2 Wheat 259; Carmeal v. Banks, 10 Wheat. 181; Hauenstein v. Lynham 100 U. S. 483, etc.) But this is no serious invasion of the police power or reserved rights of the States, inasmuch as only a comparatively small amount of property is affected by these decisions. Besides, reciprocal privileges of this nature are very frequently the subject of negotiation, and the federal government would be greatly embarrassed by a lack of power to grant them. This is not the case with educational privileges which are seldom the subject of negotiation. Yet Secretary Bayard said in 1886: "Were the question whether a treaty provision which gives to aliens rights to real estate in the United States to come up now for the first time, grave doubts might be entertained as to how far such a treaty would be constitutional."[3]

[3] Moore, *Digest*, v, §738, p. 178.

That the treaty-making power is not absolutely unlimited is admitted by the broadest constructionists with perhaps one or two exceptions. Even Butler (*Treaty-Making Power*, ii, p. 350) admits that "the fact that the United States is a constitutional government precludes the idea of any absolutely unlimited power existing. The Supreme Court has declared that it must be admitted as to every power of society over its members that it is not absolute and unlimited; and this rule applies to the exercise of the treaty-making power as it does to every other power vested in the central government. The question is not whether the power is limited or unlimited, but at what point do the limitations begin."

The strongest opinion in favor of the unlimited extent of the treaty-making power is that of Justice Chase in the case of Ware v. Hylton (3 Dall. 236), in 1796. It is as follows:

"There can be no limitation on the power of *the people* of the United States. By their authority the State constitutions were made, and by their authority the Constitution of the United States was established; and they had the power to change or abolish the State constitutions, or to make them yield to the general government and to treaties made by their authority. A treaty cannot be the *supreme law* of the land, that is, of all the United States, if any act of a State legislature can stand in its way. If the constitution of a State (which is the fundamental law of the State, and paramount to its legislature) must give way to a treaty, and fall before it; can it be questioned whether the *less* power, an act of the State legislature, must not be prostrate? It is the declared will of the *people* of the United States that every treaty made by the authority of the United States shall be supe-

rior to the *constitution* and *laws* of any *individual State*; and their will alone is to decide. If a law of a State contrary to a treaty is not void, but voidable only by a repeal or nullification of a State legislature, this certain consequence follows: that the will of a small part of the United States may control or defeat the will of the whole. *The people of America have been pleased to declare, that all treaties made before the establishment of the national Constitution, or laws of any of the States, contrary to a treaty, shall be disregarded.*"

This opinion of Justice Chase in Ware v. Hylton was quoted by Justice Swayne in Hauenstein v. Lynham (100 U. S. 483), in 1879, in favor of the view that a State law must give way to a treaty; but it is well to call special attention to the fact that Justice Swayne omitted the last sentence (which I have for this reason placed in italics) of the quotation given above. This omission has been the source of much misunderstanding and misrepresentation resulting in an exaggerated view of the real value and importance of the case of Ware v. Hylton as a precedent; for anyone who merely takes the trouble to read the syllabus of that case can readily see that it covers the real point of the decision. All else is *obiter*.

It is, however, only fair to Justice Swayne to point out that he explicitly stated that he did not "concur in everything said in the extract." He had declared in 1870: "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument." (The Cherokee Tobacco, 11 Wallace, 616. See also his opinion in U. S. v. Rhodes, U. S. Circuit Court, 1866, U. S. Rep. 28 at p. 43.) Even Justice Chase does not say that a treaty may override the Constitution of the United States.

The writer knows of no justice of the Supreme Court who states the theory of the unlimited extent of the treaty-making power in such unqualified terms as did Justice Chase in the case of Ware v. Hylton. Justice Field (in Geoffrey v. Riggs, 133 U. S., 258) did not believe that the treaty-making power of the United States extended so far as to "authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States." In the License Cases of 1847 (5 Howard 613) Justice Daniel even maintained that "treaties, to be valid, must be made within the scope of powers vested by the Constitution; for there can be no 'authority of the United States,' save what is derived mediately or immediately, and regularly and legitimately, from the constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away one right of a State ‹ any citizen of a State." In the Passenger Cases of 1849 (7 Howard 466), Chief Justice Taney gave it as his opinion that "if the people of the several States of this Union reserved to themselves the power of expelling from their borders any person, or class of persons whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens, then any treaty or law of congress invading this right, and authorizing the introduction of any person or description of persons against the consent of the State, would be an usurpation of power which this court would neither recognize nor enforce." He added: "I had supposed this question not now open to dispute." Although these opinions are clearly *obiter dicta*, and no treaty has ever been declared void and unconstitutional by any federal court, this is probably only because no case has arisen calling for such a decision. The courts

are naturally extremely reluctant to embarrass the federal government in the exercise of the treaty-making power,[4] and our government has been very careful to keep within the scope of its powers in the negotiation of treaties. Thus, in 1899, the Department of State declined a proposal of the British government to negotiate a treaty to prevent discriminatory legislation by the States, subjecting foreign fire-insurance companies to higher taxes than domestic companies, on the ground that the people of the United States were indisposed to permit any encroachment upon the exercise of their powers of local legislation.[5]

Among American statesmen who have placed themselves on record in favor of the principle that "the Constitution is to prevail over a treaty where the provisions of the one come in conflict with the other" are Jefferson, Gallatin, Adams, Calhoun, Marcy, Blaine, and Bayard.[6]

In his *Treaty-Making Power*[7] Butler informs us that there are numerous cases in which both State and federal courts have refused to construe a treaty so that it renders State legislation inoperative.

"The New York court of appeals held that a statute preventing intrusions on Indian lands within the State did not interfere with the obligations of the treaty of 1842 with the Seneca Indians, but that it was within the police power of the State, and that the State could not be

[4] In Ware v. Hylton (3 Dall. 237), Justice Chase, the strongest champion of the treaty-making power in the history of the United States Supreme Court, expressly declined to give an opinion as to whether a treaty could override the Constitution. He added: "If the court possesses the power to declare treaties void, I shall never exercise it, but in a very clear case indeed."

[5] Moore, *Digest*, v, §735, pp. 164–165.

[6] Moore, v, §§735–736.

[7] §356.

barred from the proper exercise of police powers to maintain and to preserve the peace.

"The Supreme Court of the United States sustained the court of appeals in this case (Cutler v. Dibble, 21 Howard, 366).

"It was also held that the State dispensary statute of South Carolina did not interfere with the rights of Italian citzens to freely carry on business in this country under the stipulations in the treaty of 1871 with Italy. There are other cases in which State laws have been upheld, including statutes establishing quarantine and health regulations, succession taxes, punishment of crimes, and proving title to grants in States carved out of ceded territory."[8]

The extent of the police powers and reserved rights of a State may be seen by consulting the Slaughter House Cases of 1872 (16 Wallace, 36) and the Lousiana Succession Tax Cases (see Prevost v. Greneaux, 19 Howard, 1; Frederickson v. State of Louisiana, 23 Howard, 445, etc.) Speaking of these decisions, Butler, the leading champion of the unlimited extent of the treaty-making power of the United States government, says (ii, p. 56): "The Supreme Court has, in regard to treaties, as it has in regard to federal statutes, ever kept in view the exclusive right of States to regulate their internal affairs and has not allowed either treaty stipulations or federal statutes to be so construed as to prevent the proper exercise of police powers."

In People v. Gallagher (93 N. Y. Rep. 447) it was held that "the privilege of receiving an education at the expense of the State, being created and conferred solely

[8] See Butler's *Treaty-Making Power*, ii, pp. 48–56 and notes, for a digest of a number of such cases.

by the laws of the State, and always subject to its discretionary regulation, might be granted or refused to any individual or class at the pleasure of the State." This view of the question was also taken in State, *ex rel.* Garnes v. McCann (21 Ohio St. 198) and Cary v. Carter (48 Ind. 327).

The writer, although by no means a strict constructionist, does not believe that the federal government has the right, by treaty or otherwise, to encroach upon the police power or reserved rights of the States to the extent of directing or controlling their public school systems. If there are any constitutional limitations upon the treaty-making power, if the States retain any autonomy whatsoever, they surely preserve a right to the exclusive control of the schools which they maintain out of their resources. What greater trespass upon the province of self-government, what more serious violation of fundamental rights can be imagined than federal interference with a State's management of its own schools? If our federal government should barter away such fundamental rights as these, and the courts hold such action constitutional, then the double structure of State and federal government which our fathers reared will crumble into ruins, and a new centralized edifice will take its place in which the States will be reduced to mere provinces or adminstrative units.

THE RECENT CONTROVERSY AS TO THE BRITISH JURISDICTION OVER FOREIGN FISHERMEN MORE THAN THREE MILES FROM SHORE: MORTENSEN V. PETERS

CHARLES NOBLE GREGORY

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Emmanuel Mortensen,[1] residing at Grimsby, on the thirtieth of November, 1905, being master of the trawler *Niobe*, of Sandefiord, Norway, was charged, contrary to a bye law adopted pursuant to a British statute, with using the method of fishing, known as otter trawling, in a part of the Moray Firth, five miles or thereabouts by east by north from Lossie-Mouth, which lies within a line drawn from Duncansby Head, in Caithness, to Rattray Point, in Aberdeenshire and is within the area specified in the bye law referred to, made by the fishery board for Scotland, under a power conferred by statute, which bye law had been duly confirmed by the secretary for Scotland, and duly published. He was thereby liable to a fine not exceeding 100 pounds, on conviction, and, on failure to pay, to not exceeding sixty days imprisonment and to forfeiture of his nets. At the trial, defendant stated, as a preliminary objection, that his steam trawler was registered in Norway, and the *locus* of the offense as alleged was not within the jurisdiction of the court and, reserving this plea, pleaded "not guilty." It was proved said trawler was registered in Sandefiord, Norway, and that defendant was a Dane;

[1] Mortensen v. Peters (High Court of Judiciary, Full Bench). *The Scots Law Times*. vol. xiv, p. 227, August 4, 1906.

that he did the act in the plea alleged, and that this was outside a marine league from low water mark on the adjacent coast, and within ten miles thereof.

The sheriff "repelled" the preliminary objection, found defendant guilty, imposed a fine of fifty pounds, and, in default, sentenced the accused to fifteen days' imprisonment. Defendant paid the fine and appealed, and the questions of law submitted to the high court of justiciary were, whether the sheriff's court had jurisdiction, and whether the conviction and sentence were "legal and competent."

The dean of the faculty (Campell, K. C.) led for appellants. It was argued that the statutes and bye laws in question were capable of conferring jurisdiction over foreign subjects only in British territory; that if a statute expressly applied to foreigners, courts would enforce it, but that legislation was presumed not to conflict with international law. That the decision in the *Franconia* case is still law, except as altered by the act of 1878, and that there was no common law jurisdiction below low water mark, unless in Scotland it extends to the three mile limit.

The lord justice general here referred to the *Franconia* case to show that, as in revenue cases, so in fisheries, a government may have jurisdiction over foreigners without the three mile limit for such special purpose.

Counsel boldly replied: "The right of regulating fisheries is based on no law and has no history. It is not a right of any nation in waters not territorial."

He argued that in the Behring Sea controversy, in 1893, the United States referred to this legislation with reference to herring fisheries as an example of legislating

for foreigners outside the territory. The British case repudiated that construction. That by international law territorial jurisdiction ends at the three mile limit with the exception of bays *intra fauces terræ*. That there is no case holding a bay eighty miles wide *intra fauces terræ*.

That by the North Sea convention the North Sea is defined, so as to include the Moray Firth. That Norway is not a party to that convention but, if the local law is construed to apply to foreigners, it must apply to all, and thus to those foreigners who are within the terms of the convention, and such construction would plainly violate the convention.

That the doctrine of the kings chambers (that all waters within a line from headland to headland are territorial) is wholly discredited, and is maintained by Halleck alone of modern writers.

That in case of great bays held territorial, the courts have so decided on the mixed ground of configuration and history, neither of which supports territorial claims in the Moray Firth.

The solicitor general (Ure, K. C.) led for respondent.

It was argued that the statute and bye law is clear and unambiguous, and applies to British subjects and foreigners alike. That if it were construed to apply to British subjects only, it would fail of its purpose which is to safeguard the line fishermen, and prevent the destruction of spawn, and would merely give foreign fishermen a monoply of fishing in the area designated. Whether the territory is plainly or not subject to British jurisdiction, yet if Parliament provides a regulation for that territory, it applies to *all* persons therein.

The limits of the North Sea in the convention were

solely for the purposes of that convention, and do not affect the law in question. That any water within well defined headlands, and reasonably necessary for the protection of the interest of the adjacent country, may be held territorial. That if, as in Conception Bay, a bay twenty miles wide can be territorial, so may one eighty miles wide. In that connection reference was also made to the case of the *Alleganean*[2] which held the Chesapeake Bay territorial water, and no part of the high seas. That even if the Moray Firth is not territorial, yet police regulations as to fishing may be made as to it. Its long use by line fishermen shows the interest of the adjacent country in such regulations. That Parliament has in other cases legislated for foreigners in extra territorial waters, as in the herring fisheries act of 1808, and the act for policing St. Helena, when Napoleon was a prisoner thereon, and in quarantine acts.

THE DECISION

The court answered both questions in the affirmative, and dismissed the appeal. The lord justice general in his opinion thought the question one of construction only. That the court had nothing to do with the question whether the legislature had done what foreign powers may consider a usurpation. For the court, an act of Parliament is supreme, and it is bound to give effect to its terms. It can not hold it *ultra vires* if it conflict with international law. The prohibition considered was not general, but against a certain act in a certain place, and so applies to *all* within the limits named.

[2] 4 *Moore's Internat. Arbt.*, p. 4333.

It was with intent to prevent trawling within the space designated, as a protection to fish, and to other means of taking them. To accomplish its purpose, it must apply to all persons, foreign as well as domestic, within that space which is a further reason why it will be so construed without any regard to the expediency of the statute.

That, "It is a trite observation that there is no such thing as a standard in international law, extraneous to the domestic law of a kingdom, to which appeal may be made. International law, so far as this court is concerned, is the body of doctrine regarding the international rights and duties of the State which has been adopted and made part of the law of Scotland."

He says there is no definition of what *fauces terræ* are, but:

(1) Scottish institutional writers assert jurisdiction over such water.

(2) The same statutes claim analogous places as territorial.

(3) Many more or less landlocked bays have been held subject to local legislation more than three miles from shore.

That, therefore, it is by no means inconceivable that the British legislature should legislate as to all fisheries in this firth.

That the North Sea convention does not deal with the *mode* of fishing, but only with the exclusion of foreigners, altogether, from fishing in certain localities and, therefore, does not affect this controversy.

Lord Kyllachy concurred, saying "This court is of course not entitled to canvass the power of the legislature to make the enactment."

That while there is a presumption against the legislature exceeding its international rights yet it is only a presumption, and the unambiguous language of this act overrides any presumption, and forbids certain acts in certain waters. This plainly forbids those acts in those waters by any body, and the act applies to foreign as well as to domestic fishermen.

That the purpose was to protect the area in question from a form of fishing deemed injurious, and the act would fail of its purpose, unless it were applied against all fishermen alike, and it certainly was not meant to restrain British trawlers, and leave all others free in these waters, making a hurtful monoploy in favor of foreigners.

That the presumption fails when the area is not clearly exempt, but is debatable ground.

That it is a vain suggestion that any part of the Moray Firth is as free from local control as if in the middle of the German Ocean. It is *prima facie* a bay or firth within well marked headlands, and that there is no arbitrary and artificial rule limiting the width of bays which may be controlled by the adjoining country.

That Lord Blackburn, for the privy council, in the Conception Bay case said: "Jurists were not agreed as to dimensions and configurations which made a bay part of the adjoining territory," and that this is the last deliverance on the subject.

That the convention of 1883 dealt solely with exclusive fishing privileges, and not with protective regulation of fisheries for all alike, and there is nothing therein limiting the right of a nation to regulate fishing within its territory.

That the act in question asserts jurisdiction over the

waters in question for protective purposes, and that is enough for "his majesty's courts."

Lord Johnson said: "Parliament, before and since the union, had been used to regulate fisheries about the coast beyond territorial waters in the narrower sense.

"That the acts, from 1727 to 1882, show the commission were not confined in their control to strictly territorial waters."

Lord Salvesen, newly upon the bench, concurred, and held that the Moray Firth was undoubtedly geographically *inter fauces terræ*.

That the Scotch claimed jurisdiction. That whether other powers concede this, is a matter with which the court has no concern. It is for the foreign office.

That as Norway was no party to the convention, a Norwegian subject can claim no treaty rights thereunder.

The Lord Justice Clerk, Lord M'Laren, Lord Stormouth-Darling, Lord Lowe, Lord Pearson, Lord Ardwall, Lord Dundas and Lord MacKenzie all concurred (July, 19, 1906).

The storm of disapproval which this decision has raised has apparently arisen from the steam trawling interests of Great Britain herself rather than, as might be expected, from the foreign fishing interests. The National Sea Fisheries Protective Association met in conference at Hull, the third port of the kingdom, September 18, bringing together hundreds of delegates representing wide interests, under the presidency of the Right Hon. Lord Heneage. The president, in his opening address, vigorously assailed any regulation of fisheries beyond the three mile limit, as a breach of international law and of the engagements of the nation.

A resolution was moved by Mr. Charles Hellyer of

Hull: "That this conference urges upon H. M. government the great importance to the fishing industry of maintaining the three mile international limits as now defined."

A lively and somewhat acrimonius debate followed, in which it was pointed out that: "It is impossible for a fisherman in the pursuit of his calling to calculate a greater distance than three miles from the land, and seeing that the food fishing machinery of this country is considerably in excess of the remainder of the continental nations, we should have every thing to lose and nothing to gain by the enlargement of the three mile limit." That the action of the fisheries board was based "on erroneous and wicked premises" in the interest of a small section of the fishermen of Scotland. "That they are able to keep back the tide of science and progress, improved machinery and appliances for the catching of fish which can and will supply the need of a great population."

It was urged that the interpretation given in the above case "involves the principle that by virtue of its own legislation a country can extend its jurisdiction indefinitely. If this principle is once admitted it may ultimately lead to the fisheries of Europe being partitioned off among the riparian States of Europe, and to England losing its present supremacy."

That the British steam trawling fleet was more than six times greater than those of all other countries combined.

That the area available for trawling was in general a narrow band immediately outside the present recognized limit of territorial waters.

That a thirteen mile limit (control of which the stat-

ute allowed under certain limitations) would exclude British vessels from nearly one-third of the total area available (except the White Sea), and a nine mile limit would exclude from nearly one-fifth.

The resolution was carried by an overwhelming majority only three hands being raised against it.[3]

The decision was largely discussed in a paper read before the conference of the International Law Association, at Berlin, in October last, on Territorial Jurisdiction in Wide Bays, by Mr. A. H. Charteris, of the Glasgow bar, and Mr. Charteris has communicated an extended note concering the case to the *Juridical Review*, of October 1906, in which he points out that there was no evidence of historical claim of jurisdiction over these waters.

That even the extended range of modern ordinance would give no possible command from the shore over this bay or over its entrance. That these waters were expressly defined to be parts of the high sea and of the German Ocean by the North Sea convention of 1882. That the rule of that convention as to wide bays made them territorial within a line drawn across the bay in the part nearest the entrance at the point where the width does not exceed ten miles and three miles seaward from such line. That this was taken from the Anglo-French fisheries convention of 1839, and was adopted in the legislation of France in 1888, as to French and Algerian waters, by Belgium in 1891, by Dutch law in 1889, and was much earlier applied by the German Empire; and nearly the same rule (bays of twelve miles in width are included) was adopted by Spain in 1885, in her convention with Portugal. That Norway, by

[3] See *Fish Trades Gazette*, September 29, 1906, p. 84 to 88, for a copy of which the writer is indebted to the courtesy of Lord Heneage.

legislation of 1889, draws the line as to jurisdiction over fisheries between her islands lying off the mainland a little over twenty miles apart. That Russia, by her admiralty instructions of 1893, claimed as Russian waters, at least for war and neutrality, the White Sea, and as its entrance is sixty miles wide, this approaches most nearly to the claim as to the Moray Firth. He shows the Scotch judges had in earlier cases described this firth as extending "much beyond what can properly be called a firth," and including "part of the ocean,"[4] and "a part of the sea of vast extent and extending far out into the practically open sea for a considerable number of miles."[5] That Lord Kyllachy, in 1899, held the same bye law in extra-territorial waters ineffectual,[6] and two Irish judges, O'Brien, C. J., and Andrews, J., seem to have conceded that an Irish bye law as to fisheries ought not to be construed to apply to foreigners outside the three mile limit.[7]

The writer is informed by private letter from Scotland that it is only very recently that the Scotch law officers of the crown took the view that prohibition of the statute in question was applicable to foreigners and it is matter of private gossip that the lord president, Lord Dunedin, who gave the leading judgment in the case, while lord advocate for Scotland was strongly of the opinion that a prosecution against foreigners was incompetent.

The Right Hon. Lord Heneage advises the author that the British foreign office has decided to prepare a case for the consideration of the law officer of the crown involv-

[4] Green v. Leith (1896) 23 R. (J.C.) 50.
[5] Wilson v. Rust (Ibid., p., 56).
[6] Poll v. The Lord Advocate (1897) 1 F. 823.
[7] Rex (Coleman) v. Petit (1902) 2 Ir. R. I.

ing the points decided. The writer is informed by letter of November 14, from the foreign office, that no information can at present be given out upon the subject. Denmark has taken the very correct view, as is intimated to the writer by her foreign office, that the master who was interfered with, though a Dane, was on a Norwegian vessel and, therefore, Denmark had no occasion to express any opinion in the matter as he was not under Danish law.

The *Law Magazine and Review,* which is in especially close relations with the International Law Association, in the number for November (p. 97), points out the inconsistency of the decision we are considering with the attitude of Great Britain as to the Behring Sea controversy, and says: "The Moray Firth is far too open a gulf to be properly annexed by the owners of its shore." It suggests that "Norway (to which country the ship in the present case belonged) is for reasons of her own not unwilling to acquiesce in wide claims over territorial waters."

The writer would add that he applied to the foreign office of Norway for information as to the attitude of Norway on the matter, but that office, too, had nothing to give out.

The decision turns upon two main propositions, more or less clearly laid down of general interest, and one more local in its scope.

First: That, if an act of Parliament, fairly interpreted, asserts jurisdiction in a certain place, it is binding on the court, whether or no it violates international law, and the rights of foreign nations; and that, fairly interpreted, the act considered does assert jurisdiction over the waters in question, and the acts of foreigners therein.

Second: That there is, in international law, no limit to

the width of bays which may be treated as territorial by the adjoining State, and that hence there is no conflict between the regulation in question and international law.

Third: That the North Sea convention does not limit the right of Great Britain to regulate fishing for all alike beyond the three mile limit, but merely prevents her excluding fishermen of certain nations of which Norway was not one.

Space permits the discussion only of the first two points.

As to the first proposition, notwithstanding some inconsistent language in earlier decisions, it yet seems accepted beyond question by the courts of England and the United States. A statute can change the common law of nations for all who are bound by the statute, just as much as the common law of the land; and the courts of the nation enacting it, are among those so bound.

In *ex parte* Cooper,[8] the Supreme Court of the United States refused a writ of prohibition to the United States district court for the district of Alaska, to restrain a decree of forfeiture against a British vessel for taking seals about fifty-nine miles from land in Behring Sea, contrary to a United States statute.

The court holds the seizure was made under the claim by the government of jurisdiction over the waters in question. That it was conceded that a joint action of congress and the executive would bind the courts as to such jurisdiction. That there was no such conjoint determination, and, therefore, the court must determine it.

But the court holds that it is contrary to settled law for the courts to undertake to decide whether the government is right or wrong in its jurisdiction claim (relying

[8] 143 U. S. 474.

upon five United States cases and three English decisions).[9]

One of the cases relied on is Jones v. United States,[10] where the jurisdiction of the United States over Navassa Island in the Caribbean Sea was proclaimed by the president pursuant to a statute providing therefor. The court says "who is the sovereign *de jure* or *de facto* of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court and has been affirmed under a great variety of circumstances (citing nine United States decisions), and adding: "It is equally well settled in England" (citing five English decisions).[11]

It must be conceded then that the Scottish decision is, on the first ground, fully sustained by the settled law of both England and the United States.

But, while the propriety of the court's submission to the statute of its own country must be fully admitted, the doctrine laid down by the Supreme Court of the United States, in 1808, is believed still to be law. "That whatever may be the municipal law under which a tribunal acts, if it exercise a jurisdiction which its sovereign is not allowed by the law of nations to confer, its decrees must be disregarded, out of the dominions of its sovereign."[12]

[9] Foster v. Neilson, 2 Peters 253; Williams v. Insurance Co., 3 Sum. 270, 13 Pet. 415; Luther v. Borden, 7 How 1; Georgia v. Stanton, 6 Wall 50; Jones v. U. S. 137 U. S. 202; Nabob of Carnatic v. East India Co., 1 Ves. Jr. 371, 2 Ves. Jr. 56; Barclay v. Russell, 3 Ves. Jr. 424; Penn. v. Baltimore, 1 Ves. Sr. 144.

[10] 137 U. S. 202.

[11] Moore's *Digest International Law*, i, 744–5

[12] Rose v. Himely, 4 Cranch 241; Moore's *Digest International Law*, ii, §198.

AS TO THE SECOND GROUND

Local jurisdiction appears to have been established by judicial decision in four bays or arms of the sea of extraordinary width, upon the ground that such waters are peculiarly surrounded by the territory of the nation claiming jurisdiction, and that authority has been so exercised and conceded for a length of time.

The Bristol Channel, an arm of the sea dividing England from Wales and about eighty miles long by from five to forty-five miles wide, was, in 1859, held British territory, in a prosecution against one claiming to be an American citizen for a felony on an American vessel in those waters.[13]

Conception Bay lies in the eastern side of New Foundland, between well marked headlands called Cape St. Francis and Split Point. It is forty to fifty miles long, and of an average width of fifteen miles but is over twenty miles wide at the mouth. In a contest between marine telegraph companies, the privy council, in 1877, held that the bay was part of the territorial waters of New Foundland, Lord Blackburn giving the judgment, and holding that while there was agreement that landlocked bays "belonged to the territory of the nation which possesses the shores round them, yet, there was no agreement as to what is a bay for this purpose," or what are the "dimensions or configuration" which make a bay territorial. That it is not necessary to lay down a rule since Great Britain has exercised dominion for a long time over this bay with the acquiescence of other nations, and that it has by act of Parliament been made a part of the British

[13] Reg. v. Cunningham, Bells C. C. 722, 1 Moore's *Digest International Law*, p. 739.

territory, which last fact is conclusive on a British tribunal.[14]

In 1885, the court of commissioners, for the *Alabama* claims, held that a ship destroyed by Confederate forces while at anchor in Chesapeake Bay, more than four miles from shore, was not destroyed on the high seas, within the meaning of the act under which judgment was claimed. The commissioners held that though the bay is twelve miles wide at its mouth, and some two hundred miles in length, it is wholly a part of the territorial waters of the United States. This was held on the authority of the preceding cases, the fact that it is landlocked by United States territory, and had been assumed to be United States territory in acts of congress, establishing revenue districts.[15]

In 1890, the Supreme Court of Massachusetts decided the case of Commonwealth v. Manchester,[16] and this was affirmed by the Supreme Court of the United States, in 1891, in Manchester v. Massachusetts.[17] This was a prosecution for illegal fishing in Buzzards Bay by means of a purse seine. The court in the final decision held that "in the Queen v. Keyn, wherever the question of the right of fishery is referred to, it is conceded that the control of fisheries, to the extent of at least a marine league from the shore belongs to the nation on whose coast the fisheries are prosecuted." It quotes with approval the decision as to Conception Bay, and holds: "We think it must be regarded as established that, as between nations,

[14] The Direct U. S. Cable Co. v. The Anglo Am. Tel. Co. Law Rpts. 2 App. Cases 394. *Snow's Cases Inter. L.*, p. 45.

[15] The *Alleganean* (Stetson v. U. S.) 32 *Albany L. J.* 484. 4 Moore's *Internat. Arbt.* 4333, 5 *id.*, 4675. *Scott's Cases Internat. Law*, p. 143.

[16] 152 Mass. 230.

[17] Manchester v. Massachusetts. 139 U. S. 240.

the minimum limit of the territorial jurisdiction of a nation over tidewaters is a marine league from its coast; that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit, and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free swimming fish, or free moving fish, or fish attached to or embedded in the soil."

In the case concerning the Chesapeake Bay, *supra*, the commissioners gave much weight to the case of the brig *Grange*, a British ship, which in 1793 was captured by a French privateer in Delaware Bay, which is thirteen miles wide at its mouth, and twenty-five miles at its widest. Great Britain demanded that the United States compel France to restore the ship, on the ground that the capture was within the neutral territory of the United States. Mr. Randolph, attorney general, gave his opinion that the whole of Delaware Bay was such territory, and Mr. Jefferson accordingly demanded, and France conceded, the return of the vessel. This was not a judicial decision, but was an important holding in which three great nations agreed that a great bay was territorial without regard to the three mile limit.[18]

On the other hand, the Bay of Fundy, extending 130 to 140 miles inland, with a width of 65 to 75 miles, was held an open arm of the sea by Mr. Joshua Bates, umpire, in 1853,[19] and this was cited in the Behring Sea matter, as part of the case of Great Britain.[20]

Mr. Bates holds "the word bay as applied to this great body of water, has the same meaning as that applied to

[18] See 1 Ops. Atty. Genl. 15; 1 Moore's *Digest Internat. Law*, p. 735.
[19] R. Com. of Claims, p. 170. Cited *Scott's Cases International Law*, p. 153.
[20] Senate Exec. Doc., 2d Ses., 53d Congress, 1893–4, vol. 7, part 4, p. 110.

the Bay of Biscay and the Bay of Bengal, over which no nation can have the right to assume sovereignty."

It will be observed that the Bay of Fundy and the Moray Firth are of nearly the same width, the latter being a little the wider, and an inspection of the maps will show that the Moray Firth is much less landlocked, and much more open to sea. However one of the headlands of the Bay of Fundy is in the United States, and one in British territory, and access to parts of both countries is had through its water, and these facts had weight with Mr. Bates.

The Bay of Cancale, seventeen miles in width, is claimed also as territorial.[21]

There seems little in any of these cases to support the assumption of local jurisdiction in a much wider, far less landlocked bay or gulf which has been always regarded apparently, even by the Scotch courts themselves, as a part of the ocean or high seas. It is certainly a great extension of the doctrine and seems at least to presage the revival of the doctrine of the kings chambers, before alluded to.

England's great writer on international law, Sir Robert Phillimore, collects the authorities to show that the jurisdiction over bays is limited to such as the adjoining country has something like physical command of. He quotes Vattel to the effect that the doctrine does not apply to "*ces grands espaces de mer auxquels on donne quelquefois ces noms, tels que la baie de Hudson, le détroit*

[21] Glenn: *International Law*, p. 60. Lake Borgne and Mississippi Sound, large lagoons or bays of salt water, connected with the Gulf of Mexico but landlocked, seem to be held territorial in a recent decision of the United States Supreme Court, which is by no means easily understood. Louisiana v. Mississippi, 26 Sup. Ct. R. 408 (1905). The fact that the openings into the Gulf of Mexico "are neither of them six miles wide," seems relied on. See p. 421.

de Magellan, sur lesquels l'empire ne saurait s'éntendre, et moins encore la propriété."

The claim made in argument that the doctrine of the exclusive territorial jurisdiction of the British crown over the so-called kings chambers is maintained by Halleck alone among modern writers, seems hardly warranted.

Phillimore, in his commentaries, first published in 1854, republished in 1874 says: "Great Britain has immemorially claimed and exercised exclusive property and jurisdiction over the bays or portions of sea cut off by lines drawn from one promontory to another, and called the kings chamber.[22]

The same doctrine is fully set out by Wheaton;[23] and in the fourth English edition by J. B. Atlay (1904), there is no intimation that the doctrine is obsolete or abandoned, though Hall treats it as obsolete[24].

If the waters in question are not territorial by reason of their situation within the shelter of enclosing lands, it is certainly difficult to support the claim of England to jurisdiction over a foreign vessel in them, even upon her own precedents.

Queen Elizabeth complained in a letter she wrote to the king of Denmark of the manner in which British vessels were prevented from fishing in the North Sea by Denmark claiming that it was free, *Jure gentium omniumque nationium morbius.*"[25]

When, in 1602, Elizabeth sent a special embassy to Denmark, she instructed her ambassador to "declare that the laws of nations alloweth of fishing in the sea

[22] I Phillimore, p. 239. See to like effect 1 Halleck *Inter. Law*, p. 139, ed. 1878.

[23] Chapter iv, §179.

[24] P. 159, ed. 1904.

[25] I Phillimore, p. 216.

everywhere," and further "that though property of sea in some small distance from the coast, maie yield some oversight and jurisdiction, yet use not princes to forbid passage or fishing, as is well seen in our seas of England and Ireland, and in the Adriatic Sea of the Venetians."[26]

Denmark's pretensions in modern times were limited to excluding foreigners from fishing within fifteen miles of Iceland and also of Greenland.

England and Holland strictly denied the validity of these prohibitions and adhered "to the usual limit of a cannon shot from the shore."

In 1790, Spain claimed the exclusive right of navigation and fisheries in Nootka sound, and seized British vessels therein, and complained of fisheries carried on by his majesty's subjects in the seas adjoining to the Spanish continent as contrary to the rights of the crown of Spain.

England asserted her full rights and demanded adequate satisfaction, and the matter was settled by convention.[27]

Spain has repeatedly claimed maritime jurisdiction over littoral waters to the extent of two leagues or six nautical miles from her coast but England and the United States have consistently refused to accede to this pretension. So, in 1874, Lord Derby intimated to the Spanish government that its pretensions would not be submitted to by Great Britain, and that any attempt to carry them out would lead to very serious consequences.[28]

The *Digest of International Law*, published by the government of the United States, in 1906, and very ably

[26] I Phillimore, p. 226–7.

[27] I Phillimore, p. 213, *et seq.*

[28] Wheaton's *International Law*, 4th Eng. ed., 1904, p. 277. Lord Derby to Mr. Watson, 25th Dec., 1874, U. S. Dip. Cor., 1875, p. 641. Same, p. 649. Wharton's *Dig.*, §32.

edited by Hon. John Bassett Moore[29] collects the authorities upon the subject of littoral jurisdiction. It shows that the doctrine of jurisdiction over waters within lines from headland to headland, somewhat favored by Kent, was opposed by Woolsey, as "out of character for a nation that has ever asserted the freedom of doubtful waters as well as contrary to the spirit of more recent times." It shows that the position of the United States, from 1793 down to the present time, has been that it would claim jurisdiction for three miles from its coast only, and it would concede the same and no more to other maritime nations. It fully supports this by the opinions, at first it is true somewhat doubtful, of Mr. Jefferson, Mr. Hamilton, Mr. Pickering, Mr. Madison, Mr. Buchanan, Mr. Seward and Mr. Fish, secretaries of state or of the treasury.

In 1862, Mr. Seward, by instruction of the president, wrote the Spanish minister, that the United States is not prepared to admit that Spain "can exercise exclusive sovereignty upon the open sea beyond a line of three miles from the coast," and in 1863, that it can not be admitted "that the mere assertion of a sovereign, by an act of legislation, however solemn, can have the effect to establish and fix its external maritime jurisdiction. His right to a jurisdiction of three miles is derived not from his own decree but from the law of nations."

Great Britain, in her Behring Sea case, quoted at some length, this very communication denying the claim of Spain, and said the "position was correctly taken by the United States."[30]

In 1875, Mr. Fish informed Sir Edward Thornton,

[29] Vol. i, p. 698, *et seq.*

[30] Case of Great Britain. Sen. Ex. Doc., 2d Ses., 53d Cong., vol. 7, part 4, p. 108.

British minister, that every administration of this country which had considered the subject had objected to the claim of Spain to a six mile limit on the same grounds as had the Earl of Derby.

In the same year, Mr. Fish objected to powerful nations regarding seas and bays, usually of large extent near their coast, as closed to any foreign commerce or fishery not specially licensed by them, saying, that such claim was "without exception a pretension of the past and that no nation could claim exemption from the general rule of public law which limits its maritime jurisdiction to a marine league from its coast."[31]

In 1880, Mr. Evarts, in instructions to Mr. Fairchild, minister to Spain, said: "This government must adhere to the three mile limit rule as the jurisdiction limit."

It will be seen that the rule as to fisheries does not appear to differ from that as to general jurisdiction and Mr. Moore says: "No general disposition has been manifested in recent years to restrict the right of nations to take fish in the open sea." He shows that the three mile limit has been adopted as to exclusive fishing rights in conventions between the United States and Great Britain and between Belgium, Denmark, France, Germany, and Great Britain.[32]

In 1884, Mr. John Davis, assistant secretary of state, wrote Mr. Osborn in respect to the whale fisheries off Bahia Bay: "The general law and rule is understood by this government to be that beyond the marine league or three mile limit, all persons may freely catch whale or fish." In computing this limit, however, bays "are not

[31] This is quoted in the case of Great Britain as to Seal Fishing. Senate, Exec. Doc., 2d Ses. 53d Cong., vol. 7, part 41, p. 111.

[32] 1 Moore's *Digest Internat. Law*, p. 716.

taken as a part of the high seas; the three mile must be taken outside of a line drawn from headland to headland."[33]

This improvident admission by an assistant secretary, in 1884, is met by the later declaration of a secretary of state. Mr. Bayard in a communication to the secretary of the treasury, in 1886,[34] reviews the whole subject, collects the rulings of successive secretaries of state, and the opinions of learned writers, limits all jurisdictional right to the three mile zone, and says: "The headland theory, as it is called, has been uniformly rejected by our government," and asserts that the rights of American fishermen on the Canadian coast are no further limited.

In 1896, Mr. Olney, secretary of state, in a letter to the Dutch minister concerning a proposed treaty to settle the extent of territorial jurisdiction over maritime waters, said: "I need scarcely observe to you that an extension of the headland doctrine, by making territorial, all bays situated within promontories twelve miles apart, instead of six, would affect bodies of water now deemed to be high seas, and whose use is the subject of existing conventional stipulations."[35]

The Behring Sea arbitral tribunal held that the United States had no right to control foreign vessels for any purpose, even for the protection of seals, beyond the ordinary three mile limit, but M. de Courcel has stated that the parties admitted that the three mile limit was the ordinary limit of territorial waters, and the learned editor of Hall (edition 1904)[36] thinks that decision does not

[33] 1 Moore's *Digest Internat. Law* (1906), p. 718.
[34] *Idem*, p. 718.
[35] *Idem*, p. 735.
[36] P. 155.

affect the question of the legality of claims beyond that distance.

However, that decision did hold that the United States had no right to regulate the manner of taking seal, or prescribe a close season, or forbid (as to foreigners) the seal fisheries beyond three miles from shore. This was held, notwithstanding an extensive showing of the interest of the United States in such fisheries, and the great necessity of such regulation to prevent the extinction of a useful industry.[37]

It would seem, therefore, an important authority against any nation's right to regulate fisheries (as to foreigners) beyond its own territory, however large its interests or much needed the regulations, and the ruling obtained was upon the claim and contention of Great Britain herself as to waters more or less enclosed by our territory.

Although in the Behring Sea the United States claimed jurisdiction on special grounds, yet from the beginning having for more than a century very firmly limited her own claims of general littoral jurisdiction to the three mile limit, and as firmly refused to accede to any more extended claim by any other nation, she, upon her special claim being disallowed, instantly limited her exercise of jurisdiction in these waters to three miles from low water mark. So the federal court of appeal decided in 1896 that the waters of Behring Sea, more than one league from American shore, were not Alaskan territory after the arbitral award and, therefore, that the statute of the United States for the protection of certain fur bearing animals therein did not apply.[38]

[37] See Award of Tribunal. Sen. Ex. Doc., 2d Ses., 53d Cong. 1893–4, vol. 7, part 1, p. 75, *et seq.*

[38] *La Ninfa*, 75 Fed. 513. *Scott's Cases Internat. Law*, p. 443.

Perhaps the most intelligent general discussion of the rights of a nation over the littoral sea that can be referred to is found in Hall's *International Law*,[39], and the text with the notes in the edition of 1904 is sufficiently modern. He shows the various claims of continental nations, and that a State must be supposed to accept the three mile limit as defining its marginal waters "in the absence of express notice that a larger extent is claimed." The notes show an increasing belief that the three mile limit is insufficient for "the safety of the territory," and "that it is desirable for a State to have control over a larger space of water for the purpose of regulating and preserving the fisheries in it, the productiveness of sea fisheries being seriously threatened by the destructive methods of fishing which are commonly employed."

The *Institut de Droit International*, after a very careful study and report by a committee and exhaustive discussion in 1894, resolved that a zone of six marine miles from low water mark ought to be considered territorial for all purposes.

As to the claim of jurisdiction beyond the three mile limit (except as it is justified by the place being within a landlocked bay) while the older demand of England was to exercise almost unmeasured right of interference with the ships of other nations upon the high seas, and especially in the narrow seas, and waters convenient to her coast, yet, after the war of 1812, this was wholly abandoned. In 1817, Sir William Scott, her greatest authority in maritime and international law, in a judgment of the high court of admiralty, used this language: "In places where no local authority exists, where the subjects of all States meet upon a footing of entire equality and

[39] P. 152, *et seq.*

independence, no one State or any one of its subjects, has a right to assume or exercise authority over the subjects of another," and therefore, he held, a British naval officer had no right to board a French ship on the high seas for the purpose of enforcing either an English or French law against the slave trade.[40]

This case was cited at some length on this point in the case of Great Britain as to the right of the United States to control the seal fisheries in Behring Sea more than three miles from shore.[41]

In the celebrated case of the Queen v. Keyn[42] the court of crown cases reserved, in 1876, by a closely divided court, distinctly held that England had no jurisdiction over a foreigner on a foreign ship in her littoral waters for a criminal act, but at the same time, the chief justice intimated, that if England should by legislation, appropriate to her own jurisdiction, such waters "such legislation, whether consistent with the general law of nations or not, would be binding on the tribunals of this country, leaving the question of its consistency with international law to be determined between the governments of the respective nations." He holds, further that all usage as to control of such waters is connected with "navigation or with revenue, local fisheries or neutrality." The claim of jurisdiction over the three mile limit was at once made by act of parliament of 1878, to offset the decision last considered. Nevertheless the doctrine of that case was considered to be the final one as to English adjudications, as intimated by the British board of trade in a communication procured for the writer in 1903, and on the writer

[40] LeLouis, 2 Dodson 210. *Scott's Cases*, p. 357.
[41] Senate Ex. Doc., 2d Ses., 53d Congress, 1893–4, vol. 7, part 4, p. 117.
[42] L. R. 2 Exec. Div. 63. *Scott's Cases*, 154.

quoting such communication at Antwerp before the International Law Society, in the same year, it was loudly cheered by eminent English judges then present.

This statute however claimed what all the world except her own judges conceded to England, and therefore conflicted with no international right.

Her later statutes, assuming to give her various boards or departments the right to regulate fisheries beyond the three mile limit have not met uniform interpretation at home. This is fully shown by the citations already given. In addition, I refer to the *Law Times* of London, for November 30, 1901 (p. 99), which contains the following: "The appeal to the privy council of the Dublin Steam Trawling Company against a proposed bye law of the department of agriculture which would prohibit steam trawling off the coast of Counties Dublin and Wicklow for a distance, in some places, of thirteen miles from low water mark, was heard by the judicial committee on the 22d inst. The lord chancellor, in announcing that the committee had decided to report against the sanctioning of the bye law, gave no reasons; it is impossible to think that the argument that was addressed to the committee, that the bye law would be a breach of international law, and that it was unauthorized either by the common or statute law, did not weigh with the judges. The decision of course of the kings bench division, in *Rex* (Coleman) v. Petit (1 N. I. J. R. 213) in which it was decided that a similar bye law in Co. Waterford was *intra vires*, at least so far as regards British subjects, was not binding on the committee, especially as the court was not in that case unanimous."

Of course as to British subjects on the high seas their own country can legislate and thereby violate no international right.

The decision by the judicial committee of the privy council in a matter within its discretion refusing approval to a bye law of the above character must carry great weight as to the standing of such a regulation in international law. It is a most important intimation from a very high British tribunal, that it is regarded as a trespass upon the common right unwarranted by international law.

In conclusion, itwould seem that the acquiescence of the Scottish court in the jurisdictional claim made under the authority of an act of Parliament, was in accord with the settled law and practice of England and the United States.

That in exercising the right to control fisheries in an open gulf eighty miles wide, including 2000 square miles of water, Great Britain is greatly exceeding claims heretofore sustained as to landlocked bays.

That such claims being established upon the coast of Scotland would tend to establish a like right of control upon the coast of British America which would conflict with the interests and immemorial claim of the United States.

That the claim of jurisdiction beyond three miles upon substantially an open coast for purposes of regulation of fisheries seems to have little support and to be greatly discredited by the Behring Sea contention and award, and finally, to quote the words of Mr. Hannis Taylor, that: "The postulate is fundamental that jurisdiction and territory are co-extensive."[43] And that no right to regulate what belongs to all nations can be conceded to one nation, however large her interest or enlightened her councils.

The principle of the regulation, if generally applied, would make all indentations in the coast, however wide

[43] *International Law*, p. 147.

and however open, capable of appropriation by the adjoining countries and the present limitation of littoral dominion to three miles from shore, would apply solely at the extreme headlands. The fishing grounds of the world would substantially all pass into local control, a circumstance which would tend greatly to limit the freedom of the seas which ever since the voice of Grotius was lifted in its defense has grown and ought to grow. If acquiesced in for the purpose of a beneficial restriction, the local claim is obviously apt to become the basis of complete dominion over the waters in question and all in like place. This is well illustrated by the fact that in the case mainly considered here Lord Kyllachy discussed the bye law in question as "the right of a nation to regulate fishing within its territory." The principal of that case seems to threaten the freedom of the Bay of Biscay and the Bay of Bengal.

NOTES ON CURRENT LEGISLATION

MARGARET A. SCHAFFNER

Corporations—Capitalization. The conditions under which securities of home and foreign companies may be floated in France are definitely prescribed in a new law which went into effect in that country on February 1, 1907.

Besides requiring the usual statements as to the name of the company, the country where it is organized, the duration of its charter, and the objects of its organization, the new law requires that detailed information be given as to its capitalization and that the relations existing between the company itself and its managers be explicitly set forth. It is further provided that the information which companies are required to give concerning capitalization and undertakings must be contained in all announcements of the capital issues advertised in newspapers as well as in the documents officially filed in compliance with the law.

Any violation of the provisions of the law will subject the offender to fines ranging from $2000 up to $4000 in addition to penalties provided in the general penal code.

Some of the leading provisions of the law read as follows:

"Further in the case of shares, particulars must be given of all advantages provided in favor of the directors, of the manager, and of any other persons, and of all property originally acquired by the company, and of the consideration paid or to be paid for the same, and of the methods of convening general meetings and the place of meeting. In the case of bonds, particulars must be given of the amount of the bonds already issued by the company, enumerating the guarantees thereto attached, the number and value of the bonds to be issued, the interest to be paid for each, and the time and conditions of repayment."

"The above requirements shall be the object of a declaration certified by the issuers, who must be domiciled in France. This declaration shall, previous to any public operation, be inserted in the supple-

ment to the *Official Journal* in the form to be determined by decree. Mention of this insertion with reference to the number of the journal in which it has been published shall be made in all notices, prospectuses, newspaper articles, subscription, or purchase forms."

"Any foreign company which proceeds in France to make a public issue either of shares or of bonds, shall be bound further to publish in full in the same supplement of the *Official Journal* and before any issue, the deed of constitution of the company."

By another bill now pending in the chamber of deputies a license tax of one-fourth of one per cent is imposed upon the entire capital stock of all foreign companies doing business in France.

Courts.—Interference with Verdicts and Judgments because of Technical Defect. There is pending before the legislature of Wisconsin a bill (no. 281 S) which provides: "No judgments shall be set aside or new trial granted in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice."

The champions of the measure desire to reduce the number of reversals of judgments by the supreme court because of errors in matters of pleading and practice which do not involve the merits of the case, and to expedite the final determination of the cause based upon the merits of the controversy.

The practice of the apellate courts at present is to grant a new trial if irrelevant or incompetent evidence is received which has a tendency to prejudice the jury, or, as sometimes stated, a new trial will be granted unless it can be seen that such evidence could have no influence upon the jury.

If the court is of the opinion that the error in receiving or excluding evidence was not prejudicial, a new trial will not be granted. In general the same rule applies as to erroneous instructions. It is now proposed to change the rule and grant a new trial only when it affirmatively appears that the error complained of was prejudicial; and the question which is at once presented to a person at all familiar with the rules of evidence and jury trials is, if the proposed bill is enacted into law, will it in reality work for the furtherance of justice?

While the great writers on the common law never wearied in passing

encomiums on the right of trial by jury, yet they were very careful to guard against allowing improper evidence to go before the jury. Indeed, the great bulk of the law of evidence consists of rules of exclusion; in declaring what is *not* evidence. Heresay evidence is properly excluded from the jury for the reason, as stated by Lord Mansfield, that no man can tell what effect it might have upon their minds. Likewise with irrelevant evidence. If a prosecution for murder permits evidence to go before the jury that, three years before, the accused stole rye in another State, who can say what effect it had upon the minds of the jury? Can the appellate court from an inspection of the records say that it affirmatively appears that there was a miscarriage of justice?

In the thousand years and more of the development of the right of trial by jury it has been found necessary to throw about a person accused of crime certain safeguards in order that justice may be done; and since civilization has realized that the ends and purposes of a criminal trial are as much to protect the innocent accused as to punish the guilty, appellate courts have, times without number, been called upon to apply those safeguards, those exclusionary rules of evidence, not because they are not well understood, but because over-zealous prosecutors have again and again trespassed upon them.

Under the law at present in Wisconsin and in most, if not in all, the States the court is required in every stage of an action to disregard any error or defect in the pleadings or proceedings which do not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect. (Wis. Rev. St., §2829.) Likewise in criminal proceedings, defects or imperfections in matters of form at any stage of the proceedings which do not tend to prejudice the defendant, are to be disregarded. (Wis. Rev. St. §4659.)

Is justice delayed and defeated in criminal cases by reason of reversals by appellate courts?

Out of about eleven thousand persons found guilty of charges of felony in the New York county courts, 1898–1902 inclusive, not quite nine in a thousand have had the judgment against them passed upon by an appellate court; in only two and a half cases in a thousand has the judgment been reversed. (Nathan A. Smyth in 17 Harv. Law Rev., 317.) In Wisconsin there have been ninety-eight criminal appeals in the last eight years; of these thirty have been reversed.

The records in the office of the district attorney of New York county show that in cases where the prisoner was kept in the city prison and not released on bail, in a total of about three thousand cases the average lapse of time from the date of the original arrest to final judgment, including the preliminary hearing before the magistrate, the presentation of the evidence to the grand jury, and the final disposition either by trial, plea of guilty, or discharge, was only eight days. (Nathan A. Smyth in 17 Harv. Law Rev., 317.) On the other hand, it appears that the number of new trials in this country is 46 per cent as against 3 per cent in England.

Concerning technicalities in criminal proceedings, the Wisconsin supreme court in a recent case has this to say: "Much progress has been made in ridding the criminal law of the reproach that it allows minute defects and trivial technicalities, by which none is misled, to subvert the cause of substantial justice. The ancient rules in pleading and procedure have been greatly relaxed; defects or imperfections in matters of form at any stage of the proceedings which do not tend to prejudice the defendant are to be disregarded (Wis. Rev. St. 1898, §§4658, 4659), and our statutes have gone so far as to provide that "no indictment, information, process, return or other proceedings in a criminal case in the courts or course of justice shall be abated, quashed or reversed for any error or mistake where the person and the case may rightfully be understood by the court, and the court may on motion order an amendment curing such defect." (Wis. Rev. St. 1898, §4706, State ex rel McKay v. Curtis (Wis.) 110 N. W. 189.)

The legislature can regulate the procedure in the appellate courts, the manner and the time within which an appeal can be taken, but it is equally certain that the legislature cannot assume judicial power or arrogate to the law making department power which the people through constitution have vested in the judiciary. The judiciary as a coördinate branch of the government, when acting within its proper sphere, is beyond legislative control. But irrespective of the question of constitutionality of the proposed law before the Wisconsin legislature, it is safe to say that there will be a difference of opinion as to whether justice will be served by a law which permits an appellate court to interfere with a judgment only when it affirmatively appears that injustice has been done. Irrelevant and heresay evidence which has no logical bearing upon the issues in the case and which all will agree should never be permitted to reach the ears of the jury, is often

the dominant factor in the determination of a verdict. The appellate court cannot say what weight such evidence had with the jury. In some cases it may have little weight, in others it may work flagrant injustice; the record upon appeal will not indicate which. For those reasons many will be of the opinion that in both criminal and civil actions it is more important that the trial court, which for the great majority of litigants is a court of last resort, should be guided by the rules of law and evidence applicable to the case, and that the trial judge and attorneys know with certainty that if those rules are violated the appellate court will interfere with the verdict.

WILLIAM RYAN.

Deposit of Public Funds. The question of public depositories has occupied the attention of a number of State legislatures this winter. Bills have been introduced in Washington, Oregon, South Dakota, Illinois and Indiana, besides more or less important amendments proposed in several States which already have this system.

Indiana has taken an advanced position in the law passed there. (1907, c. 222.) It provides for the selection of depositories for public funds of all kinds, applies to the whole State and to all subordinate political units, thus including township, town, city, school town and school city, county and State. Boards of finance are created for these different units. The State board is made up of the governor, treasurer and auditor, and has advisory supervision of all funds belonging to the State and coming into the hands of any State board, officer or institution. The county board of finance consists of the board of county commissioners, with the addition of the mayor and comptroller in cases where the county treasurer is ex officio treasurer of the county seat city, and of the chief executive officer of such school city. In cities the mayor and common council constitute the finance board, in towns the board of trustees, in school cities or towns the board of school commissioners or school trustees, and in townships the advisory board.

Banks eligible as public depositories must be subject to examination either as national or State banks. Security must be offered in the form of a personal surety bond signed by freeholders of the State (five for local depositories and seven for State) in a sum 25 per cent. greater than the amount of funds which may be deposited, or a surety company bond of an amount not less than the deposits. Or a part of

the whole of the security offered may be in United States, State or county bonds. All security is subject to the approval of the board of finance, and appeal from their decision may be taken to the circuit or superior court.

Banks desiring deposits must file written application for a maximum amount, file the required security and agree to pay interest on daily balances at 2 per cent, upon semi-annual time deposits at 2½ per cent, and upon annual time deposits at 3 per cent. Interest on funds of a State educational institution goes to the funds from which derived, that on school funds goes to the tuition revenue; in all other cases interest goes to the general fund of the political unit making the deposits. It will be noted that the interest to be agreed upon is a fixed amount and there is no competitive bidding for deposits. For any cause deemed sufficient a board of finance may revoke the commission of any depository designated by it, at any time, subject to a right of appeal to the courts. Depositories are to be designated every two years upon the first Monday in January, and are to be situated within the various communities to be served, and State depositories are to be selected with reference to the officers and institutions using them.

Interest is to be credited to accounts on the first of each month and an itemized statement of deposits made on that day by each depository to the board of finance under which it operates.

As many banks as comply with the provisions of law are to be impartially designated as depositories and deposits are to be awarded in proportion to capital stock. A maximum of $500,000, however, is to be exceeded only in case there are not sufficient eligible depositories to bring the deposit below that sum, and then only at the discretion of the board.

State officers and boards having offices in the State House are required to make daily settlements with the State treasurer, and the treasurers of the State, counties, cities and towns, and school cities and towns, must make daily deposits of all funds in their possesion. The township trustee must make deposits on the first and fifteenth of each month. All State officers, boards and institutions not enumerated above make monthly settlements. Checks may be drawn against such deposits of public funds only in payment of a warrant (or of a legal claim in case of the townships).

Violation of the provisions governing deposit and withdrawal of

funds constitutes embezzlement and is subject to imprisonment and fine, loss of office, and liability upon bond for any loss. When public funds have been properly deposited in a duly designated bank the officer in charge of such funds is to that extent exempted from liability for loss due to the failure or bankruptcy of the bank. The act goes into effect on December 1. Its passage necessitated a readjustment of the salary schedule for State and county treasurers.

CHARLES B. LESTER.

Fire Marshals. A State detective force headed by the State fire marshal for the investigation of the "cause, origin or circumstances" of fires is being urged in Illinois having been indorsed by Governor Deneen in his message. The bill is modeled on the Ohio (Rev. St. 1906, §409–50) law. The Wisconsin and North Dakota legislatures are also considering similar measures. State fire marshals or officers having similar duties now exist in Massachusetts, Connecticut, Maryland, Washington and Ohio; and in Pennsylvania, in cities of over 100,000, a city marshal is provided.

Hours of Labor of Railway Employees. An act "to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees" was passed by congress and approved by the president March 4, 1907. (Public—no. 274.) The act applies to any common carrier engaged in interstate transportation of passengers or property by railroad in the United States. The term "railroad" as used in the act includes all bridges and ferries used or operated in connection with any railroad and also all the road in use by any common carrier operating a railroad whether owned or operated under a contract, agreement or lease; and the term "employees" as used in the act is held to mean persons actually engaged in or connected with the movement of any train.

The act makes it unlawful for any common carrier, its officers, or agents to require or permit any employee subject to the provisions of the act to remain on duty for a longer period than sixteen consecutive hours, and whenever any employee of such common carrier shall have been continuously on duty for sixteen hours, the act requires that he shall be relieved and shall not be permitted again to go on duty until he has had at least ten consecutive hours off duty; and no employee who has been on duty sixteen hours in the aggregate in any

twenty-four hour period, is to be permitted to continue or again go on duty without having had at least eight consecutive hours off duty. Provision is also made that no operator, train dispatcher or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives or delivers orders pertaining to or affecting train movements shall be permitted to remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places and stations continuously operated night and day; nor for a longer period than thirteen hours in all places operated only during the day time, except in case of emergency when such employee may be permitted to remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any week. The Interstate Commerce Commission may, after full hearing, in a particular case and for good cause shown, extend the period within which a common carrier shall comply with this proviso.

Any common carrier permitting any employee to be on duty in violation of the provisions of the act is made liable to a penalty of not to exceed $500 for each violation, to be recovered in a suit to be brought by the United States district attorney, in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; it is made the duty of the district attorney to bring such suits upon satisfactory information being lodged with him; but no suit may be brought after the expiration of one year from the date of the violation; and it is made a duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any violations which may come to its knowledge. In all prosecutions under the act the common carrier is deemed to have had knowledge of all acts of all its officers and agents. Provison is made that the act shall not apply to crews of wrecking or relief trains, nor in any case of casualty or unavoidable accident or the act of God, nor when the delay was the result of a cause not known to the carrier or its officers or agents in charge of such employees at the time the employees left the terminal and which could not have been foreseen.

The act takes effect one year after its passage and it is made the duty of the Interstate Commerce Commission to enforce its provisions.

Income Tax. During February, 1907, a measure proposing a national income tax was introduced into the French chamber of

deputies. The measure was proposed by the finance minister and approved by the government. It proposes to tax all incomes above $1000 a year. Incomes derived from personal and real property are to pay 4 per cent; those derived from commerce, 3½ per cent; and those derived from wage employment 3 per cent. The income derived from government rentes in which French savings are largely invested is also to be taxed as above.

The proposed system is intended to replace the older forms of direct taxation such as the door and window tax, the poll tax and other direct taxes.

If the measure becomes a law, approximately five hundred thousand out of ten million of taxpayers in France will be subject to taxation under its provisions. It is estimated that the tax will net the government $24,000,000 a year.

Initiative and Referendum. A concurrent resolution for an amendment to the constitution providing for the initiative and referendum has just been passed by the North Dakota legislature. The amendment is to be referred to the next legislative assembly and if approved will be submitted to the electors for adoption or rejection.

The following are the leading provisions of the proposed amendment: Legislative authority remains vested in the legislative assembly but the people reserve to themselves power to propose laws and amendments to the constitution, and to enact or reject the same at the polls independently of the legislative assembly, and also reserve power, at their own option, to approve or reject at the polls, any act, item, section or part of any act or measure passed by the legislative assembly. The first power reserved by the people is the initiative and not more than 8 per cent of the legal voters are required to propose any measure by initiative petition. Every such petition is to include the full text of the measure proposed. The same constitutional amendment may not be proposed oftener than once in ten years. Initiative petitions are to be filed with the secretary of state not less than thirty days before any regular session of the legislative assembly and he is to transmit the same to the legislative assembly as soon as it convenes. Initiative measures take precedence over all measures in the legislative assembly except appropriation bills, and are either to be enacted or rejected without change or amendment by the legislative assembly within forty days. Any initiative measure enacted by the legislative assembly is subject to referendum petition or it may be referred

by the legislative assembly to the people for approval or rejection. If it is rejected or no action is taken upon it by the legislative assembly within forty days, the secretary of state is to submit it to the people for approval or rejection at the next ensuing regular general election. The legislative assembly may reject any measure proposed by initiative petition and propose a different one to accomplish the same purpose, and in any such event both measures are to be submitted by the secretary of state to the people for approval or rejection at the next ensuing regular election. If conflicting measures submitted to the people at any election are approved by a majority of the votes severally cast for and against the same, the one receiving the highest number of affirmative votes becomes valid and the other is thereby rejected.

The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety), as to any measure or any parts, items, or sections of any measure passed by the legislative assembly either by a petition signed by 5 per cent of the legal voters, or by the legislative assembly if a majority of the members elected vote therefor. When it is necessary for the immediate preservation of the public peace, health, or safety that a law shall become effective without delay, such necessity and the facts creating the same are to be stated in one section of the bill, and if upon aye and no vote in each house two-thirds of all the members elected to each house vote on a separate roll call in favor of the law going into instant operation, the law becomes operative upon approval of the governor.

The filing of referendum petition against one or more items, sections or parts of an act is not to delay the remainder of that act from becoming operative. Referendum petitions against measures passed by the legislative assembly are to be filed with the secretary of state not more than ninety days after the final adjournment of the session of the legislative assembly which passed the measure on which the referendum is demanded. The veto power of the governor does not extend to measures referred to the people. All sections on measures referred to the people of the State are to be had at biennial regular general elections except as provision may be made by law for a special election. Any constitutional amendment or other measure referred to the people is to take effect when it is approved by a majority of the votes cast thereon and not otherwise and is to be in

force from the date of the official declaration of the vote. The whole number of votes cast for justices of the supreme court at the regular election last preceding the filing of any petition for the initiative or for the referendum is made the basis on which the number of legal voters necessary to sign such petition is to be counted. Petitions and orders for the initiative and for the referendum are to be filed with the secretary of state, and in submitting the same to the people he and all other officers are to be guided by the general laws and the act submitting the amendment until legislation is especially provided. The amendment is self executing, but legislation may be enacted especially to facilitate its operation.

The proposed amendment for North Dakota is modeled after the system in use throughout Switzerland. In this country it has proven its practicability in South Dakota. One of the strong points of this amendment is that each measure proposed by initiative petition is first referred to the legislature. This makes provision for public hearings, debate, and the framing of a competitive measure if the legislature desires it. Careful consideration of each measure is thus secured before final action is taken.

Previous to the legislative sessions of 1907, some form of the initative and referendum had been established in Oregon, South Dakota, Utah, Illinois, Texas, Nevada and Montana. Certain partial applications of the system have also been employed in other States. Some of the measures so far enacted have been imperfectly drawn but the experience won through the practical workings of the various laws is enabling legislators to frame new measures so as to secure practical results.

The movement for the initiative and referendum has made decided advances during the legislative sessions of 1907. The Missouri legislature submitted a constitutional amendment with a practically unanimous vote in the house and but six dissenting votes in the senate. In Maine the legislature submitted a constitutional amendment to apply the system to statute law. In other States the question of securing the submission of a constitutional amendment is still pending, particularly in Michigan, Minnesota, New Jersey, Ohio, Washington and Wisconsin. In Pennsylvania a bill has been introduced to establish the direct vote system for cities and boroughs, and in Delaware the house has passed a bill for the advisory initiative and the advisory referendum for Wilmington. A State bill is also pend-

ing. At the last general election in Massachusetts, both the house and the senate were pledged to pass a bill for the advisory initiative. Recently the house has favorably reported a public opinion bill. The campaign for the direct vote system is also being carried on in some of the southern States especially in Arkansas and Virginia. The recent action of the Oklahoma constitutional convention in adopting the initiative and referendum with only five dissenting votes indicates in some measure the enthusiasm with which the system is being advanced throughout the United States.

Special Jury Act. Recent experience in Illinois in empaneling juries has created a strong sentiment for a change in the law relating to the selection of juries in that State.

In the noted Gilhooly case three months were consumed in securing a jury at an estimated cost of $18,000 to the county of Cook. The Cornelius Shea trial was a close second to the Gilhooly case and required eleven weeks to empanel a jury.

The Civic Federation, joined by ex-Judge Philip Stein, representing the Chicago Law Institute, and by Mr. Keene H. Addington, representing the Chicago Bar Association, took up the question of a law to reform the system of selecting juries, and appointed a committee of prominent lawyers to report upon the matter. The report of this committee is embodied in the special jury act (S.—no. 33) now before the Illinois legislature at Springfield. The bill as framed seeks to profit by the experience of the State of New York on the same subject and to avoid the weakness of the original New York law. In brief, the purpose of the bill is to do away in a large degree with the examination of veniremen in court to determine their qualifications as jurors, such examination being made by the jury commissioners, in counties having such a commission, or by County boards in counties having no jury commission, and thus weeding out those manifestly disqualified before being called into the jury box. The act provides for a special jury list, the number of names to be determined by the judges of courts of record in their respective counties. The qualifications of jurymen remain the same as formerly. Every veniremen must be personally examined by the commission and if found qualified is placed upon the special jury list. When a juror has served on a trial he is exempt for one year. The granting of a special jury is discretionary with the court, and the number of challenges is reduced.

Those favoring this bill cite the results of the New York law to sub-

stantiate their claim that such a law will shorten the time and lessen the expense of trials and will produce a class of jurors much superior to the average panel. The opponents of the bill make the claim that the remedy lies not in a change of laws but in a change in the conduct of the trial lawyers, trial judges, and citizens summoned to sit as jurors. They call attention to the fact that the proposed bill does not prevent full and complete examinations of veniremen as to their fitness to act as jurors, and that trial lawyers might extend such examinations as long as under the present conditions.

FRANK W. LUCAS.

Labor of Women and Children. During the closing days of the last session, congress appropriated $150,000 for an investigation into the industrial, social, moral, educational and physical conditions of woman and child workers in the United States. Special attention is to be given in this investigation to hours of labor, terms of employment, health, illiteracy, sanitary and other conditions surrounding their occupation, as well as the means employed for the protection of their health, person, and morals. The inquiry will be conducted under the supervision of the commissioner of labor.

Local Option. The crop of liquor bills for the current legislative sessions is as usual very large, affecting nearly every phase of the traffic in liquors. The States of Illinois, Colorado, New Jersey, Pennsylvania and South Carolina have considered, or are considering, general local option, and both Colorado and South Carolina have adopted it; the latter abandoning the experiment of the State dispensary. Residence district option modeled on the Ohio law, or ward option on the Indiana plan, is the chief aim of the anti-saloon elements in those States which already have township or county local option. New York is having a repetition of the struggle of last year for residence district or city ward option. Wisconsin, New Jersey and Illinois legislatures have each before them bills for residence district option, while bills prohibiting sale within certain districts near schools, churches and camps are pending in several States.

JOHN A. LAPP.

Mortgage Taxation. The question of mortgage taxation has caused and is still causing economists, the legislatures and the courts as well as the borrowers and lenders of money a vast amount of diffi-

culty. Within the last three or four years some of the best mortgage tax laws have been passed and within the same time many bills and resolutions have been introduced in the legislatures of the various States but have failed to be enacted into law.

In treating this subject it seems best, first to discuss briefly some important legislation that has been enacted within the last three or four years; second, to examine a few of the bills that have been up for consideration in the past and have been re-introduced in the present sessions; and third, to review pending legislation in Illinois, Iowa, Michigan, Minnesota, and Wisconsin.

In 1903, Alabama passed a law (Laws, 1903, p. 227–8) providing for a recording tax of fifteen cents on every one hundred dollars which is to be paid by the lender. In Wisconsin the present system of taxing mortgages as an interest in the real estate and allowing the mortgagor to contract with the mortgagee to pay all taxes on the incumbered premises was adopted in 1903. (Laws, 1903, c. 378.) In 1905 the New York legislature passed a law imposing an annual tax of five mills on the dollar (Laws, 1905, c. 729), and in 1906 this same law was repealed and another enacted requiring the mortgagee to pay a recording tax of fifty cents on every one hundred dollars or major portion thereof, to be paid but once and that at the time of recording. (Laws, 1906, c. 532.) The Constitution of Minnesota, which required that moneys and credits should be taxed was amended in 1905 and this provision left out. The amendment has resulted in one bill very similar to the present New York law and in another requiring a tax of three-tenths of one per cent on the amount unpaid on the first day of May.

At the last regular session (1905) in Illinois a bill was offered providing that a mortgage was not to be admitted in evidence in any court unless it was stamped with the assessor's stamp, showing that the taxes had been paid. A bill modeled after this one is up for consideration in Wisconsin at the present time. During the last session (1906) of the legislature of Iowa a bill was introduced to do away with double taxation in the case of mortgages and mortgaged real estate by taxing the mortgage as an interest in the incumbered property. Two bills for the same purpose are now before the legislature of that State.

Numerous attempts have been made to enact other laws but only those bills which have been introduced at the present sessions of the

legislatures in Illinois, Iowa, Michigan, Minnesota and Wisconsin will be considered here. In these States no less than thirteen bills have been introduced. Wisconsin leads with seven and each of the others have two except Michigan where nothing has as yet been done with regard to mortgage taxation at the present session.

Before reviewing the bills it might be well to consider the existing laws of these States. In Illinois, Iowa, Michigan and Minnesota mortgages are taxed as personal property; the mortgage is taxed to the holder at his place of residence and the mortgaged premises are taxed at their full value to the mortgagor at the situs of the property. In short, it is what is commonly known as the system of double taxation. This same plan prevailed in Wisconsin before the introduction of the existing law (1903, c. 378) which taxes mortgages as an interest in the real estate and permits contracting between the parties with regard to the payment of the taxes.

Under the present law in Wisconsin the mortgagee is practically exempt from taxation on the mortgage since the mortgagor usually pays the tax either with or without an agreement to that effect. Throughout the State there is a feeling, though not strong, that this is unjust, and that those best able to bear the tax are escaping. When the law was passed it was argued the mortgagor would do either one of two things. First, he would pay taxes only on his share of the mortgaged real estate, or second, he would agree to pay taxes on the mortgagee's interest as well as his own, providing that the money was loaned at a lower rate of interest. A recent investigation shows that the mortgagor usually pays the entire tax and that there has been no material change in the interest rate caused by the law. This is one of the reasons why so many bills have been introduced in Wisconsin during the present session. Some of these bills are very similar, both with regard to the object and wording, and a classification of them shows that the same result might have been obtained by three bills in place of seven. All of these bills may be classified as follows: First, bills to repeal the present law and enact the old law in force before 1903; second, bills drawn to aid the assessors in placing all taxable mortgages on the assessment rolls; third, a bill providing for a recording tax modeled after the New York laws of 1905 and 1906. Bills nos. 18 A, 20 A, 21 A and 78 S are practically the same when the end in view is considered. Each one would repeal the present law, which is similar to the Massachusetts law, and enact the old law as it

stands in the statutes of 1898, taxing mortgages as personal property. One bill (no. 78 S) also belongs in class two.

The old law was not enforced and some of the legislators are anxious to remove this defect if the old law is reënacted. Three bills, (nos. 247 A, 329 A and 78 S) have this end in view. One of the bills (247 A) is modeled after the Illinois bill of 1905 and states that all evidences of indebtedness must be exhibited to and stamped by the assessor as a proof that the tax has been paid if such evidence of indebtedness is taxable. Such security is not to be admitted in evidence in any court unless it bears the stamp or written memorandum of the assessor or board of review showing that the same has been assessed according to law. Another bill (no. 329 A) would have the presidents and cashiers of banks and similar corporations make out a sworn statement of all moneys loaned by them as agents or trustees. The bill introduced in the senate to repeal the present law (no. 78 S) goes a step further and would have all taxpayers make out a sworn statement of notes, bonds, mortgages, book accounts, and other credits owned by them on the first day of May. A mortgage subject to assessment and taxation cannot be foreclosed if it appears that it was not assessed and taxed every year while in force regardless of ownership. Bill no. 540 A is based on the recording tax law of New York, and would remedy in a measure the injustice of that law by providing that the amount of the tax should depend on the length of time for which the mortgage is to run. If the debt can be collected in a year or less the tax is to be two mills on the dollar. If the credit period is longer than one year then an additional mill is added for each year or fraction of a year. The tax thus imposed is deducted from the county tax levied against the assessment district where the mortgaged land is situated.

Two bills have been introduced in the legislature of Iowa. One of them (house file no. 4, senate file no. 83) has been introduced in both houses. It is an exact copy of the present Wisconsin law except that it is drawn to fit the Iowa code and conditions. The other bill (senate file no. 191) is somewhat like the Indiana law. It states that in the assessment of all real property, except property of corporations, the full amount of bona fide mortgages is to be deducted from the actual value of the real estate. Only what remains after the deduction is to be returned by the assessor for taxation. The mortgage is to be taxed in the name of the record owner and the assessment is to

constitute a lien on the mortgage until the tax is paid. The mortgagor or debtor may pay the taxes on the mortgage but such a payment is to be considered and treated as a payment on the indebtedness regardless of any stipulation in the mortgage to the contrary. If the tax is not paid, the mortgage may be sold, assigned to the purchaser and all rights to collect the same conveyed. This bill is unlike the Indiana law in the following respect: In Indiana the deduction is allowed only when the mortgagor agrees to state the amount of the mortgage and the name and residence of the mortgagee or assignee, and even then the deduction allowed cannot be more than one half of the value of the real estate or more than seven hundred dollars in any case.

Two bills have been offered in the senate of Minnesota. One of them (no. 111 S) is patterned after the present New York law. If it passes, mortgages will be exempt from local taxation and the mortgagee will pay a recording tax of fifty cents on every one hundred dollars or major portion thereof. No mortgage, whether owned by a person or corporation, a resident or non-resident, is to be exempt from this tax if it is secured by real property situated within the borders of the State. The tax is to be paid to the register of deeds before the mortgage is recorded. The register of deeds turns over the money received from this source to the county treasurer and he in turn sends one-fourth of this amount to the State treasurer and the remaining three-fourths is credited to the general fund of the county. The other bill (no. 225 S) would impose an annual tax of three-tenths of one per cent on the amount of the money or indebtedness remaining unpaid upon the first day of May. The register of deeds is required to make out a list of all unsatisfied mortgages and send it to the county auditor. The county auditor then makes out separate lists for each township, school district, village or city. When any payment, either total or partial is made, the same must be entered on the margin of the record. The mortgage cannot be foreclosed, neither can it be satisfied in whole or in part as long as any taxes on the same remain unpaid.

A bill (no. 157 H) introduced in Illinois provides that all real estate mortgages or other evidences of indebtedness shall be filed with the clerk of the county court in the county where the mortgaged land is situated and entered on the records for the purpose of taxation. The mortgage is also indorsed by the county clerk with the state-

ment "Duly entered for taxation" together with the date of listing and filing. No mortgage can be recorded by the circuit clerk or recorder unless it bears the endorsement of the county clerk. Once each year, the county clerk is required to make out a statement of mortgages and assignments to the township assessors and they fix the value of the instrument for taxation. Michigan had a law similar to this bill as early as 1887. At the present time Kentucky, Minnesota, Missouri, Montana and Utah have similar laws. It is true, nevertheless, that none of these States have anything like §11 of the Illinois bill, which provides that if the mortgagee or holder of the mortgage is a non-resident of the State and refuses to pay all taxes on the mortgage, the mortgagor "may pay such taxes and recover of the holder of such indebtedness ten times the amount of the taxes so paid, with costs and reasonable attorney's fees in enforcing the same." This part of the bill is modeled after the Delaware law which states that when the creditor is a non-resident of the county or State, the debtor may pay the tax on the debt and deduct the amount from the interest due or accruing, and no debtor shall make any payment to his creditor out of the State until the tax imposed upon his debt has been paid. (Laws, 1897, c. 381, amended by laws 1898, c. 25, sec. 7). Another bill (no. 693 H) introduced by the same assemblyman incorporates bill no. 157 H and changes §11 so that it states that taxes unpaid by the mortgagee whether a resident or a non-resident shall become a lien on the mortgaged property and may be paid by the person owing such indebtedness. The mortgagor shall then have credit on the next installment of interest or principal due, for three times the amount so paid. A new section is added, stating that the owner of mortgaged real estate may have the amount of such mortgage indebtedness existing and unpaid on the first day of April of any year, deducted from the assessed valuation of the mortgaged premises for that year and the amount remaining after such deduction shall form the basis for assessment and taxation for the real estate for that year; provided, that no deduction shall be allowed greater than one-half of such assessed valuation of said real estate. This bill is modeled after the present Indiana law, §12 of the bill being practically the same as §8417 of the Indiana Supplement, 1905, except that the limit of seven hundred dollars is not imposed. If this bill is enacted into law, every intelligent mortgagor will ask for the deduction allowed because the mortgage is taxed to the mortgagee as personal property whether the debtor asks for the deduction or not.

If these bills were classified according to contents and purpose and not according to States some bills would fall into two classes and we would have the following results:

1. To repeal the existing law and re-enact the old law: four in Wisconsin, 18 A, 20 A, 21 A and 78 S.

2. For a more complete assessment of mortgages as personal property: one in Minnesota, 225 S; two in Illinois, 157 H and 693 H; three in Wisconsin, 78 S, 247 A and 329 A.

3. For recording tax: one in Minnesota, 111 S; one in Wisconsin, 540 A.

4. For a personal property tax but allowing the mortgagor to make deductions, the Indiana system: one in Illinois, 693 H.; one in Iowa, 191 S.

5. For the system of taxing mortgages as an interest in the real estate, the Wisconsin system: one in Iowa, 4 H., 83 S.

6. For an annual tax: one in Minnesota, 225 S.

ROBERT CAMPBELL.

Reciprocal Demurrage. This subject which has come into prominence in very recent years, is attracting considerable attention at the present sessions of the States legislatures. The failure of the railroad companies to furnish reasonably adequate service for transportation has aroused the people to an attempt to compel them to supply cars for transporting products upon reasonable notice. Such legislation becomes of real importance only in those States where a large part of the commerce is intra-State. The decision of the United States Supreme Court in April, 1906 (Houston and Texas Central Railroad Co. v. Mayes, 201 U. S. 321) which declared that the attempt to compel railroad companies to furnish cars for inter-state commerce is a violation of the interstate commerce clause of the Constitution, has rendered such laws ineffective in many States. In those States which have a large volume of intra-state commerce, such as Illinois, and New York, a reciprocal demurrage law could quite effectually accomplish the desired ends. In these two States bills proposing to penalize railroad companies for failure to furnish cars after reasonable notice, are being agressively pushed. Bills are also before the legislatures of Wisconsin, Iowa, Minnesota, Michigan, North Dakota, South Dakota, Pennsylvania and Indiana. These all embody some of the main features of reciprocal demurrage by requiring cars to be furnished and to

be loaded or unloaded within a reasonable time In some of these States reciprocal demurrage will be effective and in conjunction with a national law, which is being urged will require the railroads to furnish reasonably adequate facilities for transportation so far as laws can accomplish that end.

JOHN A. LAPP.

Social Democratic Program in the Wisconsin Legislature.[1] It is frequently held that the socialists do not have a constructive program. The six social-democratic members of the State legislature of Wisconsin, however, have advanced about seventy carefully drawn measures, which indicate the lines along which they intend to carry out their ideas. They are limited more or less of course, by present constitutional provisions but they propose a number of constitutional amendments, and even a constitutional convention, by which they hope to make way for further socialistic legislation.

It should be noted that some of the measures which the socialists have advanced heretofore, are now being taken up by representatives of other parties. Whenever this occurs, the socialists first satisfy themselves that the measure is properly drawn, and if so, they do not introduce a bill themselves, but support these measures. In the present State legislature of Wisconsin, there are some eight or ten measures of this kind introduced by republicans and democrats. Nearly all of these had been introduced by the socialists at previous sessions, but had been voted down. The socialists, while supporting these measures, still claim them as a part of their program and use their utmost effort to advance them.

In this line, may be mentioned a bill to give the referendum to cities, which was introduced by a democratic assemblyman; a sweeping municipal ownership bill, almost identically the same as the one introduced two years ago by the socialists, now introduced by a republican assemblyman. The proposition for an amendment to the constitution to provide for direct legislation in State matters, was introduced by a republican and is supported by the socialists, as is also another measure for the recall. A bill by a republican senator

[1]The following summary of social-democratic activities in the Wisconsin legislature was written by the Hon. Carl D. Thompson, national committeeman of the social-democratic party and leader of the socialist group in the Wisconsin assembly. The party has five assemblymen and one senator in the present legislature.

providing for a teachers' retirement fund or pension, is along the line of the socialist idea ofol d age pensions. Several measures, some of them very sweeping, in the direction of municipal ownership, have been introduced by republicans, and will be supported by the socialists. Perhaps the most striking socialistic measure introduced by the non-socialist parties, is a resolution which commits the State to the policy of State ownership of all water-ways and water-power. All of these measures, more or less socialistic, are regarded by the socialists as their own measures, and will be supported by them.

Of the directly socialistic measures advanced in the legislature, the following are the more important:

DIRECT LEGISLATION. The initiative and referendum has been a part of the socialist program since the beginning of the movement fifty years ago. As they find it possible, under the constitution of the State, to inaugurate direct legislation in the cities and counties, their bill provides for this. All acts of a municipal council or board of supervisors of any county, except such as are for the immediate preservation of peace, or the public health or safety, or the expenditure of money in the ordinary course of the administration of the affairs of such public corporation, are to be submitted to the electors for their approval or disapproval at the next municipal or general election, whenever 10 per cent of the electors petition for such referendum. A 15 per cent petition may order a special election. The majority of the votes cast determines the question. The petition for a referendum vote upon any measure passed by a municipal council or board of supervisors suspends the force of the measure until it has been acted upon. The mayor of the city may not veto a measure adopted by the electors. This measure, provides only for direct legislation in the cities and counties. The socialists are anxious, however, to have the law apply to the State at large, and especially to the State legislature. They, therefore, have a measure for a constitutional amendment to provide for this as well.

Along with the provision for direct legislation, the socialists have also advanced a measure to provide for the recall of elected officials by their constituents. This provides that upon the presentation of a petition signed by 25 per cent of the entire vote for all candidates, asking for the removal of a certain official, and stating the reasons, a new election shall be ordered. Candidates may be entered for the new election in the same manner as in the regular elections, and the

official sought to be removed is a candidate unless he declines. If some other person than the incumbent receives the highest number of votes, the incumbent is deemed removed from office.

LABOR MEASURES. The socialist legislators naturally give special attention to the requirements of labor. These measures cover a great variety of subjects. They have a bill providing for an eight hour day for all employes engaged by any city, village, town, school district or municipal corporation in the State or by any contractor or subcontractor thereof upon any public works. Another measure requires every corporation doing business in the State, to make full settlement with a full payment in money to its employees at least twice in every calendar month.

Several measures intended to limit child labor are advanced. One prevents the employment of a child under fourteen years of age in bands, in circuses, and in theatrical exhibitions for pay. Another prohibits the employment of girls under eighteen years of age in breweries. Other measures drawn on the basis of the standard child labor law suggested by the Consumers' League, seek to impose further restriction on child labor.

The socialists have endeavored to add to the child labor laws already existing in Wisconsin, a provision limiting labor of children to eight hours a day; prohibiting night work for children under fourteen; and establishing a physical and educational test. They have also a rather drastic measure proposed in a joint resolution to congress, asking that body, upon the basis of its right of taxation, to levy a tax of $1000 per year for each child engaged in the manufacture of products for interstate commerce. In order to insure better conditions of labor, the socialists have introduced a bill to increase the number of factory inspectors.

They have also proposed to give any city in the State the power to establish trade schools for the promotion of industrial education, by giving practical instruction in the useful trades. These schools are to be a part of the public school system, under the general management of the local school board, who are to have the power to prepare the courses of study, employ instructors, purchase machinery, tools and supplies.

Another labor measure provides for thirty-six consecutive hours rest in every seven days. Another seeks to protect the health of employees in the metal polishing trade by requiring the use of neces-

sary fans or blowers to carry away the dust arising from emery wheels, belts and other devices used in metal polishing. A law which provides that factory managements should provide protection for bull-wheels, fly wheels, and other dangerous machinery was so worded that such protection could be removed after once being applied. This was amended so as to prevent this evasion. Another bill seeks to establish an eight hour day for employees in plants where high explosives are manufactured.

The railroad employees have, of course, received attention. A bill provides for an eight hour day for all telegraph operators and train dispatchers, No operator is to be required or permitted to be on duty more than eight successive hours in any consecutive twenty-four except in cases of casualty, in which case the operator may be on duty not more than twelve successive hours in any consecutive twenty-four. The law is more comprehensive than the federal law just passed in that it does not except stations that are not in operation continuously night and day. It was also discovered that the railroad companies in Wisconsin were operating their trains without a full crew as required by the laws of the three adjoining States. A measure was, therefore, introduced requiring every passenger train of more than three passenger cars, and all freight trains to have two brakemen.

The question of employers' liability has been given due consideration. The general employers' liability law, urged by the socialists, seeks to abolish contributory negligence as a bar to the recovery of damages, and another bill is drawn on the line of the British compensation act.

Finally, a measure has been introduced to protect the trade unions. It provides that it shall be lawful for trade unions and other associations peacefully to obtain or communicate information to other persons, to persuade them to work or abstain from working. It furthermore provides that an agreement of persons in the furtherance of a trade dispute shall not be ground for an action, if such act, when committed by one person, would not be ground for action; and also that action shall not be brought against a trade union for the recovery of damages sustained by any person by reason of the action of a member or members of such trade unions.

MUNICIPAL MEASURES. The more detailed features of socialist legislation with reference to the municipality, could best be studied in the

city councils where the socialists have had representatives. The city of Milwaukee has had from nine to twelve social-democrats in the city council for several years. These men have advanced all possible legislation in the direction of public ownership and direct legislation in the city. Such measures as were possible under the State laws, have been advanced, and many of them have been carried. It is not practical to attempt a discussion of these measures at this point, and we mention only such measures with reference to municipal affairs as have been brought forward in the State legislature.

Perhaps the most important feature of the socialist legislation with reference to municipalities, is a repeated demand for municipal autonomy. The socialists have a measure seeking to give the municipality entire autonomy over all matters distinctly local. The same purpose appears in various amendments which are proposed to other bills. For example, in the general proposition which is now being made to give the State railway commission the power to fix rates to be charged by public service corporations in municipalities, in Wisconsin, the socialists propose to amend the measure so that the commission shall have power to determine what are fair and equitable rates, but the municipalities shall be given the absolute power of fixing these rates upon the basis of the information furnished by the commission.

The socialists in the city council of Milwaukee were able to secure the passage, by unanimous vote, of a recommendation to the State legislature, asking for a law that would give the city practically unlimited authority for the establishment of the municipal ownership and operation of all public utilities. This measure, which comes before the State legislature, as a bill introduced at the request of the city council of Milwaukee, is nevertheless a distinctly socialist measure. The city council, acting under the initiative of the socialists, has also introduced measures to give the city authority to build model dwelling houses, to establish municipal fuel yards, ice plants, slaughter houses and a municipal dredge. All of these seek to clear the way for the extension of the principle of muncipal ownership.

Realizing the importance of having the cities in possession of scientific and up-to-date information in establishing public works, the socialists have introduced a measure providing that whenever the common council of any city shall require the services of engineering

experts in planning or constructing public works, it may make application through the mayor, to the president of the State university, who shall assign such experts from the college of engineering to assist the municipality. Provision is made that the board of regents may secure such additions to the engineering college as may be required to carry out the provisions of this measure, In this way it is thought cities will be protected from errors and failures in municipal undertakings arising from incompetent officials. In this connection, another bill provides that all cities are authorized to establish a public works department, which may undertake directly the carrying forward of any and all public works and improvements, such as the city may decide upon.

Another measure is intended to protect the city from an abuse that is not at all infrequent on the part of corporations that secure franchises, and then do not utilize them. It provides that any corporation that has received a franchise, and fails to make reasonable progress towards its utilization, shall forfeit its privilege and the franchise shall revert to the city.

STATE LEGISLATION. The socialists have introduced a number of measures which apply to the State in general. For example, at the last session of the legislature, a committee was appointed to investigate the practicability of State insurance of all kinds. One of the socialists was appointed on this committee. The majority made a fairly well prepared report, but were averse to State insurance, Naturally, the socialist member of the committee brought in a minority report, strongly urging the State of Wisconsin to take the necessary steps toward establishing State insurance. This report was printed together with the majority report, and presented to the legislature. The report considered at length the different forms of State insurance in nearly all of the foreign countries, and discussed the attempt which was made in the State legislature in Florida at the last session to introduce State insurance there. After summarizing the findings of the committee regarding the success of government insurance in foreign countries, covering sickness, accident, invalidity, old age, as well as the regular life insurance, and adding a number of considerations not contained in the majority report, the minority strongly recommended that the State legislature at once appoint a commission which should employ one or more insurance experts, secure such other scientific advice as may be required, and recommend at the

next session of the legislature a system of State insurance, to cover sickness, accident, invalidity, old age and death. It pointed out that the system should embody: (1) life insurance upon the usual basis of scientific knowledge of risks and liability; (2) old age and invalid insurance for all who have been residents of the State of Wisconsin for a period of ten years, who have led a sober and industrious life for the last five years preceding their application for pension, and who have not been guilty of any civil or criminal misdemeanor; (3) accident and sickness insurance with proper provisions and restrictions. The minority also recommended that a committee be appointed to draft resolutions to the national congress of the United States, requesting that body to take the necessary steps for the organization of national insurance which shall also cover the various forms outlined above.

This minority report offered by the socialists, seems to have won considerable favor in the legislature, and, following this policy, the socialists have introduced two measures: one provides for the amendment of the State constitution, so as to enable the State to undertake State insurance, the other provides for the appointment of a commission which shall investigate all of the systems of government insurance in the various foreign countries, and report to the next session of the legislature a system best adapted to the needs and situation in the State.

State printing has suggested another line of legislation. A great deal of trouble has been experienced with reference to the State printing. Accordingly, the socialists have introduced a measure which proposes a thorough investigation of the subject, and another proposes a constitutional amendment so as to allow the establishment of a State printing plant to be owned and operated by the State.

With reference to the public schools, the socialists have a bill providing for free text books throughout the State. They also seek to establish agricultural schools in every county, each school to teach the particular line of agriculture adapted to its respective locality. In the vicinity of large cities, garden farming may be taught; in dairying sections, branches affecting that line; in sections of the State where the timber has been removed, reforesting and similar subjects may be taught; in other sections, stock raising; in short, whatever branches may be required by the local situation.

With reference to the courts, the socialists hope to secure justice

to the people who toil and make it equally accessible to rich and poor. They have a measure providing for the office of public defender in every county of the State. The features of this measure are discussed further on.

Perhaps one of the most drastic measures, is the bill which provides that railroad officials shall be held guilty of murder in the case of avoidable accidents. This grew out of the terrible record of railroad wrecks this winter.

But however comprehensive and far reaching these measures may seem, they do not satisfy the socialists. There are many things contemplated by their program which are not permissable under the present State constitution. They are, therefore, active in urging a constitutional convention, and have a measure for that purpose. In this demand, however, they are not alone. The present constitution, like that of many of the other States, was adopted nearly fifty years ago. Some of the most obvious and popular needs of the people cannot be met because of certain constitutional restrictions. There is an almost unanimous demand, for example, from every section of the State for State aid in the construction of a uniform system of good roads. But the constitution makes it impossible. This is only an example of the way the State has outgrown its constitution and thus the socialists will quite likely be supported by the other parties in the matter of a constitutional convention. It is quite likely, therefore, that such a convention will be called. In that event, the socialists will urge all of the constitutional amendments which are necessary, in order to allow the further development of their program.

Reorganization of the Courts. The socialists demand that justice shall be free. They are anxious to make it as easy for the poor man and the laborer to have the benefit of legal protection, as for the rich man, and the employer.

Perhaps their most important measure, in this respect, is the one providing for the election in each county of a so-called public defender. His duties are to be to institute and prosecute actions for the collections of wages, where the amount claimed is less than $75, to institute actions for damages; to appear for and defend persons who are without counsel and without means, and to appear in any court in his county in the interests of justice, and to advise with and appear for persons in need of legal advice, who are without means to employ such counsel.

Another measure, providing for the defense of the poor in the courts is a bill which is a copy of the federal law, which gives legal counsel to those who are unable to pay for it. And finally, the socialists have a memorial to congress, urging that the federal judges shall be elected by the people. This, they think, will tend to make them more responsive to the demands of justice to the poor and the working classes.

National Legislation Suggested. The most important measures in the Socialist program cannot, of course, be limited to the State or carried out by the State. The socialists, therefore, have made liberal use of memorials to congress, urging the passage of measures which they believe will provide for these matters. For example, taking advantage of the measure introduced in congress on the twenty-seventh of February, of this year, for the government ownership of railroads, the socialists have introduced a memorial in the State legislature, urging the passage of this or some similar bill, for the establishment of the government ownership of railroads. In this connection, they have another resolution, urging congress to condemn, appraise and lawfully take over, by the right of eminent domain, as public property for the United States, every railroad, express, telegraph, telephone business or property now being, or that may hereafter be operated by receivers. In view of the fact, that there have been more than 660 railway receiverships established during the last twenty-five years, this measure offers a significant suggestion as to the method of acquiring government ownership of such public utilities.

Other memorials to congress urge the establishment of postal savings banks, parcels post, the exclusion of Asiatic labor, and one memorial urges congress to invite the nations of the world to send delegates to an interparliamentary union for the purpose of discussing and establishing a system of international arbitration, and investigation of disputes between nations and to arrange for a permanent interparliamentary union at stated intervals in the interests of universal peace.

Carl D. Thompson.

Taxation—Segregation of Sources of Revenue. The legislature of Missouri by a vote of nineteen to eleven in the senate, and ninety-one to eighteen in the house of representatives, voted to submit to the

people a constitutional amendment in accordance with the recommendation of the State tax commission of which Mr. Frederick N. Judson was chairman. The proposed amendment makes provision for abolishing the State general property tax, for separating the sources of State and municipal revenue and for giving the counties and cities local option in taxation. The amendment will be voted on at the general election in 1908.

Trade Unions and Trade Disputes. The British trade disputes act of December 21, 1906, modifies the law relating to trade unions and trade disputes in several important particulars. The act relates to "any dispute between employers and workmen or between workmen and workmen which is connected with the employment or non-employment or the terms of the employment or with the conditions of labor of any person and the expression 'workmen' means all persons employed in the trade or industry whether or not in the employment of the employer with whom a trade dispute arises."

The act eliminates the century-old controversy as to conspiracy by providing that "an act done in the performance of an agreement or combination by two or more persons shall if done in contemplation or furtherance of a trade dispute not be actionable unless the act if done without any such agreement or combination would be actionable." The act also authorizes peaceful picketing.

Briefly, the new act places trade unions upon the same footing as other associations as regards civil liability for acts done in furtherance of any trade interest or trade dispute, and while it provides that trade unions may not be sued in tort, they may be sued in contract.

Sir Frederick Pollock in his work on Torts (p. 317) has enunciated the rule of law that "Persuading or inducing a man without unlawful means to do something he has a right to do, though to the prejudice of a third person, gives that person no right of action whatever the persuader's motives may have been." Prof. Richard T. Ely has pointed out that "A corporation may while pursuing its own interests incidentally injure another, but it is not therefore held liable and the law ought not to hold trade unions liable."

Although the conspiracy and protection of property act, of 1875, (38 and 39 Vict. c.86) relieved trade unions of criminal liability, they have continued to be civilly liable (Quinn v. Leathan 1901, A.C. 495; Giblan v. Nat. Amal. Union, 1903, 2 K.B. 600; Glamorgan Coal Company v. S. Wales Miners' Federation, 1903, 2 K.B. 545) under

circumstances in which other associations escaped liability. With the enactment of the trade disputes bill the British law has finally evolved to the point where trade unions are placed upon the same footing as other associations in regard to civil as well as criminal liability.

Workmen's Compensation. In December, 1906, the British parliament passed an act to amend and consolidate the law of workmen's compensation. The act extends the benfits of the law to over six million persons not included under the provisions of preceding acts.

BOOK REVIEWS

Centralization and the Law. Scientific Legal Education. An Illustration with an Introduction by MELVILLE M. BIGELOW, Dean of the Boston University Law School. (Boston: Little, Brown & Co. 1906. Pp. 296.)

The object of the course of lectures given by the dean and professors of the faculty of the Boston University Law School, which is reproduced in this volume, is thus announced in Dean Bigelow's preface: "To study the causes of this confusion [between the principles of law and the rules of business], to study the means of removing it, to study the relations generally of business to law, all this is within the proper sphere of the law school, and should make part of its work. * * * The law schools should aim to fit their students to help provide for and administer in the most skilful way, whether in the courts or the legislature, through the press or otherwise, whatever in the affairs of our day pertains to the law."

The difficulty with the carrying out of this aim is that the making of laws, *i.e.*, legislation, and the administration of the law are two wholly distinct things. Great confusion has arisen by a failure to distinguish between law which is simply legislation, and law which is the science of jurisprudence. True enough, the punishment for violating the regulations of a board of health, for instance, is to be imposed in a judicial proceeding, but it does not follow that the lawyer is con cerned with the wisdom and expediency of regulations relating to the public health. His concern is as to how legislation of that kind is to be interpreted and applied in the courts. Indeed, in a very broad sense, the line must be run between mere public policy on the one hand, and judicial procedure on the other; and if the question is not what the courts have decided, but what in the interests of public expediency and policy they ought to decide; between what the law administered in the courts actually is, and what it might be or ought to be if our constitutional system were different or our conceptions of public policy other than they are, then, such a question is not for law-

yers, but for educated men generally, and it is not one with which the law schools ought to be concerned. There is very considerable danger that the law student may be led to think that what the law ought to be or how it ought to be administered is of more importance than to know what the law actually is or how it will be administered, and with reference to which he will be expected to advise his clients.

Lawyers ought to be, and confessedly are, better fitted by training to be public administrative officers and legislators than persons who have no special legal training; but it does not follow that the general purposes of a law school should be construed as involving the preparation of its students to hold public office or to engage in the direction or regulation of public affairs. The legislator should not only have a general understanding of law, but also of economics, administration, the management of business affairs, and even of medicine and pedagogics, for legislation must relate to a great variety of subjects affecting the public health, public education, and the management of various kinds of business; and it can hardly be expected that the law schools shall direct their attention to furnishing such special preparation for those who may be, or may hope to be, legislators.

Law may very properly be considered a branch of social science, and there is no logical inconsistency in giving technical instruction in law so as to make it illustrative of the theories which may be entertained with reference to the principles of that science. But the division of human knowledge into branches is wholly theoretical and arbitrary. The law is also a large part of public administration, but it is doubtful if any particular assistance in the comprehension of the law as administered in the courts is to be derived from so treating it. The law is involved in a study of history or of ethics, but it does not follow that it is within the functions of a law faculty to teach history as history, or ethics as ethics, in order that the student may get a proper conception of law as law. The fact is that historically the study of the science of law is older than any scientific study of sociology, administration, or ethics; and while the theoretical conceptions developed in connection with those subjects have taken account of the existence of law as the courts administer it, they have not furnished the reason for the rules of law, nor have they substantially affected those rules. Whether the law ought to be modified so as more nearly to conform to the conceptions which have been developed in the study of sociology or ethics, may properly be a matter of discus-

sion, but it is difficult to see how such a discussion is of any practical value to a lawyer in his profession until it has become apparent that some such modification is to take place and is to affect the decisions of the courts.

The primary object of a law school is to prepare lawyers to discharge the duties of their profession. Such preparation should not be narrow in its scope, and yet, in view of the technical preparation absolutely necessary, it is doubtful whether the present boundaries of legal education can be very considerably enlarged without either unreasonably extending the time of preparation for entering upon professional life, or, on the other hand, omitting subjects which are absolutely essential in the proper discharge of professional duties.

On the whole it seems doubtful whether the effort indicated by this volume to induce law teachers and law students to omit subjects in technical law for the purpose of enlarging their studies in theories of administration and government will be successful, or indeed, ought to be successful. The liberal education which the lawyer should have, may well be required of him as a preliminary preparation; but the work of the law school must necessarily be confined to subjects which are largely technical, and the instruction must necessarily be given by those who devote their principal attention to the law as it is administered.

EULIN MCCLAIN.

International Law. By L. OPPENHEIM, LL.D. Lecturer on International Law, University of London. (London: Longmans, Green and Company. Vol. I. 1905. Pp. xxxvi, 610. Vol. II. 1906. Pp. xxxiv, 595.)

As might be expected the events of far-reaching importance which have taken place within the past decade in the field of international relations have led to an increased interest in the subject of international law. This interest has created a demand for works interpreting the subject in the light of recent developments. An excellent example of the attempts to satisfy this demand is the work of Mr. Oppenheim, written professedly as an elementary work for the purpose of giving the general reader a survey of the whole field. To use the language of the author: "It is a book for students, written by a teacher." In common with nearly all present day writers upon the

subject, he makes international law rest upon consent. He discards the narrow definition of law and puts forth the following: "Law is a body of rules for human conduct within a community which by common consent of this community shall be enforced by external power." It is doubtful if in this formulation of a definition he has done much toward clearing up the question of whether or not international rules of conduct are law. It may be that this is one of the "definitions more or less ambiguous," which, to use his own language, "have been intentionally so framed because the actualities on which they are based are not altogether clear."

The work consists of two volumes. Volume I treats of peace and is divided into four parts. Part I discusses the subjects, Part II, the objects of the law of nations, Part III, the organs of international relations; Part IV, international transactions. It will no doubt strike the reader as a little strange that the peaceful settlement of disputes should be discussed in the volume on war rather than in the volume relating to peace.

Volume II discusses war and neutrality. The author's conception of war seems to us open to criticism. He says: "War is the contention between two or more States through their armed forces for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases." This makes all wars, wars of conquest. Such a definition might well have been formulated by Alexander or Napoleon, but it does not correspond to the present conception. The purpose of war is to assert and protect rights, the overpowering of, or injury to, the other nation is incidental. The possibilities of war should not be confused with its purpose.

Upon the question of the capture of private property at sea, Mr. Oppenheim's view is the orthodox British view. There is a strong tendency toward conservatism discoverable throughout the volume, though perhaps not to such an extent as to detract from its value. The work as a whole is a valuable one, and the criticisms offered should not be interpreted as a lack of appreciation on the part of the the reviewer of its careful, painstaking character. The author has placed students of international law under obligations to him for the amount of research he has done and the plain manner in which he has given to them the results of his industry.

EDWIN MAXEY.

La colonisation et les colonies allemandes. Par ANDRÉ CHÉRADAME. (Paris: Plon-Nourrit. 1905. Pp. 485.)

We have in this volume of M. Chéradame a careful study of the various German colonies, drawn from German sources. The book is exceedingly well written, and, in the treatment of his subject, the author shows the same intellectual grip of his facts that characterizes other works from the same pen.

M. Chéradame wastes little time discussing theories of colonization, holding that, so far at least as German colonies are concerned, theories cut very little figure. In a compact introduction he sketches in clear outline the "*preliminaries de la colonisation,*" and traces the development of the German colonial spirit. The tardiness of Germany in seeking to extend her sway over distant portions of the earth is ascribed to the fact that while, during the sixteenth, seventeenth and eighteenth centuries, other great powers were active in securing colonial possessions, Germany lacked both a national spirit and a governmental unity.

When, in the latter half of the nineteenth century, Germany had become one people and had welded the diverse States into an empire, she found but little scope for the exploitation of a colonizing spirit, save in the more or less tropical zones of the earth. In addition to this condition of things without her borders, she had to contend with a policy within, which refused to consider any interest as vital to the German government which lay beyond her own boundaries. Bismarck believed firmly in a strongly intensive work on the empire itself. Save for the protection he afforded certain German commercial companies doing business at distant points, he gave little aid to colonial enterprises. A distinct and aggressive colonial policy had no place in Bismarck's scheme of things.

Meanwhile the work of List and Friedel, the labors of savants and travelers, who compassed the earth in the interest of German learning had begun to bear fruit in a new attitude toward German problems. Economic forces compelled Germany to look beyond her own frontiers. The intensive policy of Bismarck gave place to the wider outlook and world politics of William II. The colonial enterprises of Germany have been pushed with perseverance and tenacity for twenty years. And it may be affirmed that, in general, the results obtained do not seem to correspond to the efforts put forth.

"At the present time there is not a single German colony which is sufficient unto itself, and there is a sacrifice annually of more millions than ought to be imposed upon the empire in order to cover the discrepancy that exists between the receipts and the expenditures. And if, from the commercial point of view, the acquisition of the colonies has opened outlets for German industry, it must be remarked that such outlets are very inconsiderable, and that these peoples situated in the enervating tropics, have small need of manufactured products. The proportion added by the colonies to the sum total of German commerce annually, represents only an infinitesimal part of that total, and does not at all correspond, at this moment, to the sacrifices imposed on the nation in order to gain it.

In spite of the pessimistic impressions which the situation actually warrants, if one should avoid a forced admiration and optimism in his judgments with respect to German colonial operations, he should also shun the opposite extreme. Besides the faults and errors committed, many good results have been shown, which are an expression of the real qualities of the German genius. One need only point, in this respect, to the intelligence and perseverance evidenced in scientific research, in exploration, in attempts at improvement of land, in efforts devoted to the spread of instruction and the engendering of a taste for work among the natives. If the economic results obtained up to the present time are small, one must not forget that German colonization dates back scarcely more than twenty years, that it represents only a period of tentative endeavor, in the course of which the inevitable political and administrative mistakes have proven prejudicial to the economic development.

It should be borne in mind always and everywhere, that the German colonies are situated in tropical regions, as little fitted for European life as for a rapid economic evolution.

The most just conclusion which can be reached with respect to the German colonies seems to have been set forth in that melancholy pronouncement of M. de Tattenbach, ambassador of William II., at Morocco, made recently at Tangier: "The other powers have great colonies, in which they are able to favor their own commerce by special tariffs. The colonies of Germany are few in number and they are small."

The real question, in fact, is this: Whether the government in Berlin will content itself with accepting this situation of a colonial

checkmate, or whether it will not seek to secure for itself lands beyond the sea, which it now lacks, at the expense of other powers, which are in possession of to the disadvantage of Germany.

Now, England, and more especially France, has colonies that seem to correspond to German needs.

That is why, in the last resort, the colonial problem of Germany is at bottom the problem of continental Europe; that is why it is one of the mightiest elements in world politics.

The book is divided into three parts, the first of which deals with the foundation of the German colonies, the second with the juristic condition of the colonies, and the third with a description of them, together with an exposition of their administrative organization and economic development. Each part is preceded by a careful introduction. Subjoined to the volume are numerous statistical tables, showing the various important items in the economic development of the German colonies. Several valuable maps also accompany the work.

M. Chéradame has, as a matter of course, handled his subject in a masterly way, with a keen insight and a judicial temper, which renders the book of great value to students of colonial affairs.

BURT ESTES HOWARD.

Municipal Ownership in Great Britain. By HUGO RICHARD MEYER. (New York: The Macmillan Company. 1906. Pp. 339.)

It might be interesting to gather together the views of the Belmonts, Ryans, Elkins, Weidners and other franchise owners on the question of municipal ownership. But it would not be a treatise on municipal ownership. Neither is the volume under review. It is, rather, an attempt to show the evil influence of State interference in any form with industry. The testimony of the Senate committee on interstate commerce, taken while the Hepburn rate bill was under discussion, would be very convincing to the railway officials who were called to testify to the exclusion of other witnesses. But it did not convince the country that anarchy and confusion would follow an attempt on the part of the government to regulate railway abuses.

Dr. Meyer has written a book which bears witness to the disapproval of municipal ownership by the financial interests of Great Britain. He has taken his material largely from the joint select parliamentary

committee on municipal trading and other committees, as well as the debates of Parliament. In fairness, it should have been stated that most of the witnesses and many of the members of Parliament were promoters, agents, directors or officers of private companies seeking franchises. And they were hardly qualified to pass upon the success or failure of municipal ownership in Great Britain.

This is a little strange, in view of the fact that the joint committee itself of 1901 and 1903, in two very voluminous reports, found little ground for such a finding. It limited its criticism almost wholly to objections to the method of accounting on the part of the municipalities. And this report was from a committee about as kindly disposed to the subject as the franchise corporations themselves, and which selected its witnesses much as the United States Senate selected its experts from among the railway presidents and attorneys in their hearings of last year.

The testimony of the cities is almost wholly the other way, as is public opinion. And the cities ought to be the best judges. For the English city is the most efficient political agency in Great Britain. And it is a rate payers' city. If municipal ownership had failed, the town councils would have speedily abandoned it. But there is no movement in Great Britain against municipal ownership. Quite the reverse. The cities are constantly enlarging their activities. All of the large cities, with the exception of Dublin, Edinburgh, Bristol and Coventry, own and operate their tramways. There are 101 municipal tramways both owned and operated; 334 public electric light undertakings; 260 public gas supplies, and 1045 public water companies.

And what have been the results? From Sir Henry Fowler's *Return of Reproductive Undertakings* brought up to the thirty-first day of March, 1902, it appears, taking 193 water works, 97 gas works, 102 electricity supplies, and 45 tramways, that they earned an average net profit (after the payment of interest, depreciation and debt repayment) of $2,786,383. These same enterprises have reduced their indebtedness out of earnings to the extent of $60,000,000, and have $18,000,000 more in their sinking fund. Certainly, from the taxpayers' point of view, municipal ownership is not a failure.

This result has been achieved in the face of the fact that the cities have greatly reduced rates and charges, have improved the condition of their employees, have enlarged the service, and have otherwise made the industries serviceable to the people. And the people are

not complaining of municipal ownership. Their complaint, when made at all, is that the enterprises make too much money.

It is true, the English cities have made use of these industries for relieving the rates. For the English city is a taxpayers' city. And they have seen in these industries a means of relief from taxation. The gas supply of Manchester contributed $291,990 to the relief of taxation in 1905. The city of Leicester contributed $228,765, and the city of Birmingham, $265,351. The tramways in the cities of Leeds, Manchester, Liverpool, Nottingham, Salford and Hull paid sums ranging from $55,965 to $253,058 to the common treasury.

Dr. Meyer admits that the English cities have made money from their undertakings. This can not be gainsaid, yet it is one of the things he complains of.

This is the most serious criticism that can be brought against municipal ownership in Great Britain. The policy of the cities has been too cautious. They have taken too great precaution for the future. They have forced the consumer to pay for his service, and contribute to the rates as well. The net result of this is that the taxpayers have taken what previously went to corporation dividends. And, as the English voter enjoys the suffrage because he is a taxpayer, the gain is a pretty universal one. At worst the class which is benefited has been greatly widened. Under private ownership the industries were operated for the benefit of a few thousand stockholders. Now, in England (for industries do not relieve the taxes in Scotland) they are operated for almost all of the people. And this is the ruling class in the towns. Trading is still conducted for a class, but it is a very large class.

But this has been accompanied by a marked decrease in charges and a great improvement in service. Street railway fares have been reduced from 30 to 40 per cent. below the charges of the private companies. The average charge per thousand cubic feet of the 260 public gas companies was 65 cents in 1904. The average charge of the 459 private companies for the same year was 71 cents. Many cities have a very much lower rate. Glasgow sells gas for 57 cents; Leeds for 52 cents; Belfast for 55 cents, and the little town of Widbes at from 38 cents to 22 cents. And the candle power of the public companies is equal to, if not greater, than that of the private companies. The volume under review says little if anything of these features.

From a financial point of view, municipal trading in Great Britain

has proved a great success. The saving to the people in reduced rates and public earnings is unquestioned. The only qualification of this uniform success is in the matter of the electricity supply. Many of these enterprises were taken over within the last few years. Their construction was of a very permanent sort, and in anticipation of future needs. Some of the cities, too, had to pay exorbitant prices to private companies under the Parliamentary rule for appraisal. And the rates charged by the public undertakings are usually below those of the private companies.

Dr. Meyer has approached this subject from the point of view of the business interests. And they naturally find a great deal of fault with the cities for destroying their most profitable fields of venture. The cities have taken over these industries because they have lost confidence in private management, and themselves desire to enjoy the profits which were passing into private hands. The volume is an elaborate plea for non-interference by government in industries of a monopolistic character. The author ends his treatise with the assertion that public service industries which use the public streets do not differ from ordinary trading and manufacturing ventures, and that the slow development of electric lighting and electric traction in Great Britain is due to the limitations placed by Parliament on the franchises and the greed of the towns. A far more potent influence is the inertia of Great Britain. Her people are slow to move. This is true in politics no less than in industry. In so far as the cities contributed to this retardation, it was due to the fact that Parliament proposed to grant franchises to private companies of forty-two years duration. The cities feared the creation of a private monopoly. This could only be prevented by obtaining the powers themselves. It was the only way to head off the companies. For the cities of Great Britain do not grant their own franchises. This is done at Westminster. The cities, therefore, obtained the powers to undertake the enterprise themselves. And they moved with British caution in doing so. They have been saved many mistakes. But, judging by present indications, the electricity supply of Great Britain will have fully recovered any ground which may have been lost during the next few years.

Dr. Meyer complains bitterly of the policy of the cities, and says that in the matter of "suburbanizing" population they have "shown an indifference to and a disregard of the public health, physical as well

as moral, that for brutality have no parallel in the records of private industry." Complaint is specifically made of the cities of Glasgow, Birmingham, and Manchester.

It is almost incredible that such a sentence could have been written by even the most casual student of the English city. Dr. Meyer blames the cities for the fearful tenement conditions and the zone system of street railway fares. He lays at the door of the town councils the congestion of the English cities. As a matter of fact, no tramways existed in Great Britain prior to the tramway act of 1870. But at that time the British city was a fearfully congested thing. It is generations older than the tramway. For twenty-one years the cities were in the hands of private companies. The private companies adopted the zone system. The people grew familiar with it. The cities inherited the practice from the private companies, and have not seen fit to abandon it. Municipal ownership of the tramways did not begin until Glasgow took over the private lines in 1894. But it is not the English city that is "brutal." It is the landowning class. The English city has no general power of eminent domain. Land, as land, is untaxed. It may be worth hundreds of thousands of pounds an acre and be used as grazing land just outside of the city. It is taxed as grazing land. The cities cannot buy, and Parliament will not permit them to levy local rates upon the land. For local taxes in England are collected from the actual rental received by the landlord. It is this that throttles the English city; that strangles its growth and development; that herds the population into the most fearful tenements of Europe. As a matter of fact, the cities endeavored to use their tram lines to relieve the housing question. But they found that any development into the suburbs merely increased the value of suburban land, which could only be bought on the untaxed landlord's terms. It was this fact that aroused the cities to the organization of the League for the Taxation of Land Values. In the face of these very readily obtainable facts, it is an unmerited reproach on the municipality of Glasgow to impute the terrible housing conditions to the greed of the city's town council in the administration of its tramways.

Further than this, the public tramways and electric lighting plants are, almost without exception, the best in Great Britain. Few, if any, failures have been made. The service is of a superior sort. And the period of their greatest usefulness is just beginning. The public gas, electricity and tramway companies are as progressive as the

private ones. Often their operation cost is lower. They earn larger dividends. Their charges are less. And they have achieved success in the face of the most aggravating supervision by Parliament, many of whose members are interested in the private companies which the cities want to take over.

In so far as the adverse comparison of English to American conditions are true at all, they should not be laid at the door of the towns or of Parliamentary regulation of private industry, any more than the general decay of English agriculture, trade and commerce should be attributed to legislation. The cause is a deeper one. It is all of one whole. It lies in the English character and the fear of change from what is known to what is untried.

This volume was written from the view point of the irritated promoter. It goes further than the Parliamentary committee itself dared go. And it ignores completely the mass of easily available and uncontrovertible testimony of the towns themselves. The truth about slavery could as readily be gotten from the debates of the Southern Confederacy as the truth of municipal ownership from the sources which Dr. Meyer has consulted.

FREDERIC C. HOWE.

The City: The Hope of Democracy. By FREDERICK C. HOWE, Ph.D. (New York: Charles Scribner's Sons. 1906. Pp. 319.)

If one were to amend Dr. Howe's sub-title to read "The Municipal Ownership and Single Tax City: the Hope of Democracy," one would come a little nearer to describing his thesis, which he discusses and develops with skill and ability.

He contends, and with a large measure of truth, that "for the best part of a century we [Americans] have been endeavoring to secure good government by legal [legislative] enactment. We have a childish confidence in paper forms." This was a truer characterization a half dozen years ago than it is now. We are beginning to realize that our tools (laws) must not only be adapted to the work in hand, but must be carefully used by skillful men. The mere purchase of a new set leaves us practically as badly off as we were before. Reformers are very apt to stop with the placing of an act upon the statue books, thinking that that is all that is necessary, whereas their work has only just begun.

Notwithstanding his clear perception of this American tendency, Dr. Howe himself falls a victim to it when he comes to discuss his remedies—the single tax and the municipal ownership of public utilities. For instance, in the chapter entitled the City for the People (p. 295), after describing the cause of the problem from his point of view to be the creation of a social fund through the crowding of mankind, which is in excess of the present and future needs of government, he declares that all this can be reformed through a change in our methods of taxation. In short, there is a panacea for our ills, and that panacea is the single tax.

Thoughtful students of the municipal problem may advocate taxation reform, and most of them do, but as one of several means to the end, not as the sole one. The problem is much too complex and too complicated to yield to a single solvent.

Dr. Howe believes that poverty forms a main cause of our municipal troubles and that through reform in the methods of taxation "poverty would be relieved, for poverty is an eradicable thing." It is not a dispensation of Providence, as we interpret the scriptural expression, with which we justify our inaction. Nor is it true that the poverty which is everywhere increasing in our cities is traceable to "nature or the devil," which has made some men weak and imbecile, others lazy and worthless. I wish I could believe that poverty is eradicable, but to my mind the evidence is overwhelmingly against it. The best we can hope for is a gradual alleviation, a gradual improvement, and that is being manifested as our author himself recognizes. It will come as a result of modern methods of philanthropy and reform—but effective as they are in the hands of the capable men who are devoting themselves to the regeneration of mankind, it has to be confessed that the millennium is not yet within near speaking distance.

Dr. Howe is equally sanguine concerning the effectiveness of the municipal ownership of public utilities. It is to solve the city problem, abolish poverty, and generally introduce an era of good feeling. Thus he says: "In efficiency of service the public water companies equal, if they do not surpass, the privately owned ones. In almost every city the service is cheaper and better, measured by cost and the convenience of the people, than that offered by the traction companies, the gas or the electric lighting plants. All this is to be expected. For the city is able to, and in most States must, buy in the cheapest market. The credit of the city is of the best. It can borrow

money at from 3 to 4 per cent. It has no dividends to pay on watered stock. It is constantly under scrutiny, and with rare exceptions, engineering talent of a high order is placed in charge of municipal companies" (p. 120).

All this may be true in Cleveland where Dr. Bemis is superintendent of the water bureau, but it is certainly not generally so throughout the country. However, it must be admitted that as a rule the water plants have been much better handled by municipal corporations than have the gas and electric lighting plants owned and operated by them.

The municipal ownership of public utilities as recommended by the National Municipal League's committee on municipal program in 1899; and municipal operation where local conditions demand it, is a far different thing from advocating universal municipal ownership and operation as a "sure enough cure."

In the descriptive portions of his book Dr. Howe is effective. His analysis of the evils incident to private ownership and operation is clear and convincing. Except where he is urging his particular remedies, he writes convincingly and with an adequate knowledge of modern conditions and tendencies. Possibly his public career, first as a councilman in Cleveland and later as an Ohio State senator, and for the past half dozen years as an open and enthusiastic supporter of Mayor Tom L. Johnson, has given his work an air of advocacy and partisanship.

Reformers will quite generally agree with him in declaring for municipal ownership and for taxation reform, but it is to be doubted if they will give to these means so large a place in the coming municipal reconstruction as he does.

The book is entertainingly written and is suffused with a serious, ethical purpose. Whether one agrees with Mr. Howe's rules of proportion, one is impressed with the fullness of information and his earnestness. It is a stimulating volume and brings out as do few books of this kind the hopefulness of the municipal outlook and the steady growth toward a wholesome municipal democracy.

CLINTON ROGERS WOODRUFF.

The Election of Senators. By GEORGE H. HAYNES, Ph.D. (New York: Henry Holt and Company. 1906. Pp. 295.)

Mr. Haynes has written an interesting book which is intended to advocate the advisability of a change in the method of electing senators, for this purpose is clearly indicated in the last chapter. This is an old story, old at least for us, dating back to the Constitutional Convention of 1787. The importance of the problem is emphasized, or accentuated, now, because of a generally admitted deterioration of the Senate, and in this paper, only the ills of the Senate can be discussed. There is a natural inclination to recommend, for a cure of the evil, a new method of electing senators. Whether or not the remedy would be effective is a serious question. Americans seem to believe in legislative medicine. Sometimes it is an economic, sometimes a political evil, that, it is thought, may be cured by a statute, or a brand-new set of statutes, fresh from the purifying fire of a legislative furnace. It is still doubtful, however, after many applications of patent nostrums, whether laws on the statute book work all the miracles that have been expected of them. Perhaps it is so with new methods, or systems, that have been adopted from time to time, especially for the administration of municipalities, and it may be, that the mere change in the method of choosing senators will not also change the character of the body, or make it a more easily tolerated branch of the national legislature. How are we to try to change it? We certainly could not adopt Hamilton's plan, and substitute a college of electors for the State legislatures, nor would we make land ownership a condition precedent to the right to vote for senators. Of recent years, we have become so obsessed by a conviction that property is injurious to its possessors and to the community, that we do not at all incline to Hamilton's, or to speak more accurately, to eighteenth century notions about wealth. Shall we then adopt James Wilson's theory that senators should be elected directly by the people? Mr. Haynes believes that both the Senate and the State legislatures would be improved if senators were elected by the direct vote of the people instead of by the State legislatures.

In support of his proposition, he has pointed out in a most painstaking way some of the more obvious or aggressive evils of the present system. What these evils are may be briefly mentioned. In the first place, we have the many deadlocks which have deprived some

of the States of their proper representation in the Senate, especially since the enactment by Congress of the law providing for the manner and the time for electing senators.

That this law is responsible for the weakness and sinfulness of State legislatures is doubtful. There are much deeper causes. But it is true that State legislatures have failed to elect when they should have done so, while, in other instances, after many ballots, unexpected men have been chosen to the Senate. It is also true, although Mr. Haynes does not clearly and strongly make a point of it, that most, if not all, of these accidents are not men of the first, or even of the second, rank. It does not follow, however, in every instance that the failure to elect has injured the State or the Senate, or the country. In Delaware, for example, there were 113 ballots and no election in 1899; in 1901, two vacancies existed and forty-six ballots were taken in an attempt to fill each vacancy. In both instances, no choice was made. The country was fortunate in the democratic majority of one in the State Senate in 1899, and in the like republican majority in 1901, and in the small republican majorities (10 and 6) on joint ballot. In 1898, the republican popular majority was 2738; and in 1900, it was 3613. It is perfectly fair to assume that if we then had had popular election of senators, Addicks would have been chosen by the popular vote. This, however, is a mere suggestion that popular election may fail to be a panacea. It is undoubtedly true, that Mr. Haynes has mentioned a real evil, and one that has been felt in many States. In the table which he calls Record of Deadlocks, he gives his readers fourteen failures to elect since 1890, affecting the representation of ten States. Of the fourteen deadlocks, five occurred in Delaware. One of the failures to elect was in Pennsylvania in1899. This, at the time, Quay being the victim, was considered as a triumph of virtue over the historic impulses of the Pennsylvania legislature. It is possibly, nay probably, true in this case, as in that of Delaware, that the evil would have triumphed if popular election of senators had been the rule. On the other hand, it is true that W. A. Clark might have failed in Montana in 1899, if his agents had been compelled to deal with an electorate larger than the State legislature. Still again, it would be difficult to show that any man of character and ability, who would have been recognized by his State and by the country as a proper person to sit in the Senate, was defeated by reason of the prevailing system; whether we would presumably have had a better

senator if we had not been condemned to election by the State legislature.

This raises the essential question: Can we, by changing the method of election produce good results from evil conditions? In Mr. Haynes' recorded list, which seems to be unduly expanded by giving the elections in which many—sometimes not so many—ballots have been taken, there are, let us presume to say, three bad figures, most of the others being of little consequence. These three are, Addicks of Delaware, Quay of Pennsylvania, and Clark of Montana. In each State, the majority of the party to which the senator or candidate belonged was as follows: Delaware, 2738; Pennsylvania, 118,006; Montana, about 11,000. I have given the popular majority obtained by the successful party in the election next preceding the election of the legislature which balloted for senator. It must be recognized that, in each instance, the man who was his party's candidate for senator before the legislature would have been his party's candidate for senator before the people, and with the possible exception of Clark, he would have been elected. In other words, the trouble lies back of the legislature, and it is of a kind that will result in sending bad men to the United States Senate, precisely as it puts bad men in the executive chairs at the State capitals. The man who is chosen senator is the candidate of the boss, or he is the boss himself. Mr. Quay and Mr. Hanna were bosses. Mr. Clark was perhaps not the boss before he desired to be elected senator, but he became one by the employment of the decided advantage which he possessed over every competitor. Addicks was the boss, and so of others; but every Platt must have a Depew, just as every Quay must have a Penrose. It is true that bribery is supposed to be employed and there is much evidence of the truth of the charge. It is also true in the purchase and sale of senatorships that there is perhaps more direct dealing with the members of the legislature than in the ordinary traffic in legislation. It has been said by the buyers in the shambles that the modern system has an advantage over the former because it is simpler. The dealing is confined to one person, who disposes of the votes of his law making slaves for so much. Whatever part of the price they receive is from him and not from the purchaser. In the sale of senatorships the rule seems to be different. The root of the matter is, that senators are not chosen by the legislature after careful consideration and deliberation. Neither would candidates be nominated by a convention in the sane

and intelligent way which we are prone to picture to ourselves whenever we think of the working of our chosen reform. The boss, or money, under present conditions, will rule in the one as in the other. Mr. Haynes seems to put much faith in the direct primary, but it is doubtful if that system of selecting candidates embodies the virtues that have been predicted of it. At any rate, it has not yet established its place in the *Materia Medica* of political reform, as a cure or all the evils of the caucus and the convention. Indeed, we are quite as well within the bounds of reason—to our thinking, the theory is very much more surely settled—if we assert that nominations are not likely to be improved until the law forbids anything like official participation by party organizations in the selection of candidates.

There is nothing in existing political or party practice in this country to prove that a change of the system of electing senators will improve the Senate. There was a time, and that not long ago, when it might be said that there were men in the Senate who could not have been elected governors of their States. If we run over the names of the present governors and compare them with the senators from the same States, we shall not be able to say that this is true today. We once thought that New York would not elect Mr. Platt to be governor; but it has elected Mr. Odell, long Mr. Platt's associate in the leadership of the party in New York. On the other hand, it is probably true that Mr. Roosevelt could not have been elected senator by the State legislature. Nor could Mr. Hughes have been. It is true that popuar opinion is often effective in compelling good nominations by conventions; but this is true only when the party managers believe that public opinion in favor of some man is so strongly aroused that a failure to make him the party's candidate will probably result in the party's defeat at the polls. But a good deal is required to excite the public opinion to the contentious degree at which the boss melts, or to create an excitement that is so intense as to produce a mental or emotional fever, or an exposure of public crime and vice so shameful as to incite the wrath of the people and keep it alive until election day. The occasions on which public indignation will compel the nomination of good men for senators will be as rare as they have been in forcing the nomination of good men for governors.

There is no doubt that Mr. Haynes is justified in saying that the present system interferes with State business. It is, however, a

question whether it follows that State legislatures would take advantage of the opportunity offered them to attend to "their normal work," that is, if there is involved in the theory of "normal work" the requirement that it shall be honorable and intelligent. If the modern legislator was not selling privileges, or demanding money to refrain from attacks upon vested rights, as well as disposing of United States senatorships, all at the dictation of the bosses, he might be expected, perhaps, to perform the work of the State if he were relieved of the single duty of choosing a sentaor. Moreover is there any legitimate hunger for more State legislation than we have?

It ought to be recognized that in dealing with this subject we are not dealing with it as a whole, or as an original proposition. Mr. Haynes carefully and fairly gives the arguments on both sides of the question, but he comes to the conclusion that the weight of argument favors the popular election of senators. This is the concluding sentence of his book: "Never before has the opinion been so widespread that the Senate is sadly in need of mending, that the mending will never be done by the Senate itself, nor by the State legislatures, but that it can only be accomplished when the people, in self-reliant, manly fashion help to mend it by taking the election of senators into their own hands."

The precise meaning of this sentence does not appear. How may the people properly elect senators, or take into their own hands from the legislature the power to elect, except by an orderly and legal amendment of the Constitution? If a riot, or a revolution, or an appeal to the "higher" law is intended, it is evident that lawlessness is contagious. But is there any self-reliant, manly fashion that does not imply obedience to the law?

However this may be, it is clear that Mr. Haynes is dealing with certain evils of the Senate, all summed up in the word "deterioration," which, in his opinion, puts the Senate in "need of mending." Mr. Haynes is justified in reaching this conclusion, and we are justified in confining ourselves to the evil, and their proposed remedies. He has included, however, among his evidence of deterioration some attributes, or characteristics, of senators which do not serve to strengthen his argument: the ages of the senators, their occupations, their former legislative experience, and their wealth. All of these things are interesting, and Mr. Haynes has gathered some illuminating statistics regarding them. Some of his information, however, especially that which concerns the rich, or supposedly rich, senators attributing their

success mainly or largely to their wealth, has the defect of being hearsay, and, probably, if the truth were known, much of it is gossip.

There are many better indications of the deterioration of the Senate than Mr. Haynes has given us. There are, for example: some of the recent legislation of the Senate; the increase of appropriations; the character of the debates; the trading off of a force bill for tariff legislation; the bargains between senators touching private legislation; the atmosphere of speculation in which some senators dwell, using as they do, their legislative powers for personal gain; the growth of that evil rule of senatorial courtesy which enables legislators to use constitutional checks as an unconstitutional club. These furnish the best evidence of the deterioration of the Senate.

So long as there exist the legal opportunities which senators now make use of for their own advantage, so long will politicians, of the kind which the people permit to manage their public affairs, take advantage of those opportunities. The character of senators cannot be changed by changing the system of their election. The Senate controls all appointments not protected by the civil service law and the rules made to carry it into effect, and thus controlling the patronage of the government, by their power of confirmation, a power which has been enormously increased by their vicious rule of courtesy, they control the party and its machinery. The machinery of the party, in its turn, worked by the boss, who may be the senator himself, or at least the ally of the senator, provides the candidates. In ordinary times, in most instances, and in most States, the candidates for governor of the two party machines are the only persons for whom the people may vote, as, in the case of senators, they are the only persons for whom the legislature may vote. There is, indeed, another side to this question. There is a growing unrest among the people, and a growing independence, but while all this gives us hope, it affords us no data for the determination of such a question as that which Mr. Haynes discusses.

The concluding paragraph of Mr. Haynes's preface expresses the truth with a clearness that is absent from the concluding sentence of his book. It is as follows:

"This book will fall far short of its purpose if it fails to carry the writer's firm conviction that electoral forms and methods are of slight import, except as they affect the spirit of the choice, and that neither the continuance of the present system, nor the resort to

popular election, can long secure the Senate which the best interests of the country demand, unless back of the method there be found the vigilance, intelligence, and the conscience of the individual voter."

HENRY LOOMIS NELSON.

The Arbiter in Council. (New York: The Macmillan Company. 1906. Pp. vi, 567.)

This volume, as the title suggests, is a treatise on peace and war, and is published anonymously. The form is that of a symposium. The characters in council are fictitious, but, nevertheless, representative, including men from different professions. The arbiter, who presides at the meetings, is a liberal after the order of Cobden and Bright. The other disputants are: a lawyer, who is described as a barrister "with a conscience," an ecclesiastic with a "liturgical instinct," a captain of the intelligence department of the war office, a retired admiral, a stock broker, a Cambridge historian and pupil of Lord Acton, and the editor, a young economist and newspaper reporter.

Most of the participants have been requested to prepare papers on certain assigned topics, the reading of which is interrupted by questions from the listeners. The various topics discussed are: The causes and consequences of war, modern warfare, private war and duelling, cruelty, the federation of the world, arbitration, the political economy of war, and Christianity and war. These discussions take place every day for a week, the last topic being taken up on Sunday. The author probably presents no new material, but he has succeeded in putting into very readable form what has been said by others. The work is also valuable in that it gives in one volume a summary of the best arguments on the subjects considered. It is in fact a storehouse of material on these subjects from the earliest times to the present. Scarcely a topic is left untouched, from the doctrine and practice of the early Christians in regard to military service to the consideration of what an arbitration treaty should include. The work is of such a character that it is impossible to make extracts which would give any idea of the book as a whole. The writer shows varied scholarship and is evidently familiar with the authorities on the subjects discussed.

HORACE E. FLACK.

NEWS AND NOTES

Personal and Literary

J. W. GARNER

Prof. Abbott Lawrence Lowell, who has been absent in Europe during the first half of the academic year, has resumed his courses at Harvard.

Prof. Edward Henry Strobel has resigned the Bemis professorship of international law at Harvard and returns shortly to Bangkok, where he resumes his post as general adviser to his majesty the king of Siam. During the second half of the current academic year the course on international law at Harvard will be given by Prof. George Grafton Wilson of Brown University.

Major Leonard Darwin, of the Royal Engineers, author of *Municipal Trade: Its Advantages and Disadvantages*, comes to America shortly, and will deliver a course of lectures at Harvard on municipal ownership in England.

During the absence on leave next year of Prof. T. S. Woolsey of Yale University, his courses in international law will be given by Charles Cheney Hyde, associate professor of law in Northwestern University.

Prof. J. W. Jenks of Cornell University has been appointed as one of the three "civilian" members of the immigration commission authorized by congress at the recent session.

Dr. James T. Young, director of the Wharton School of Finance and Commerce of the University of Pennsylvania, has been promoted to a full professorship of public administration.

During January and February, Dr. Albert Shaw delivered a series of eight letures at Columbia University on the Blumenthal foundation. The lectures dealt with a group of problems relating to population, national domain, political parties, foreign policy, public administration, etc. A second series of eight lectures upon the same foundation

was delivered by President Woodrow Wilson in March on the subject of Party Government in the United States.

The faculty of the Harvard Law School, in December last, awarded the James Barr Ames Prize consisting of a medal and $400 "for the most meritorious law book or legal essay written in the English language and published not less than one nor more than five years before the award" to the late Prof. Frederick William Maitland, Downing professor of the laws of England in Cambridge University. Unfortunately the decision of the judges did not reach him before his death. The award was based on Professor Maitland's three volumes of the year book series of the Selden Society. The Toppan Prize of $150 offered in Harvard University "for the best thesis on a subject in political science" has been awarded to Stuart Daggett, Ph.D., instructor in economics, for a dissertation on *Railroad Reorganization in the United States*. It is expected that the monograph will shortly be published.

Mr. Alleyne Ireland who has been for some years engaged in the preparation of a monumental work on colonial administration, especially in the Orient, expects to have the first volume ready within the next few months. Volume I will deal with the British administration of Burma. The publishers are Messrs. Small, Maynard & Co.

Prof. Paul Vinogradoff of Oxford University has accepted an invitation to deliver a short course of lectures upon Comparative Ancient Law to the students of the Harvard Law School during the latter part of the current academic year.

Prof. Archibald Cary Coolidge of Harvard is giving the Hyde lectures at the French universities during the present year. During the first half of the year the lectures are given in Paris, and during the second half at the various provincial universities. Professor Coolidge has taken as his general subject: The United States as a World Power.

Prof. George H. Blakeslee of Clark University who visited Russia during the past year and made a study of social and political institutions has been giving a series of public lectures in Worcester upon Political and Social Conditions in the Russian Empire.

Mr. R. M. Johnston, lecturer in history at Harvard, has prepared for publication a two-volume edition of his father's memoirs. These

memoirs, the writings of an observant American in Paris during the second empire, afford much interesting data concerning the political undercurrents of the period.

The family of the present Earl of Durham have given to the Canadian Archives a large collection of personal papers and memoranda of the first Lord Durham, author of the famous *Report on the Affairs of British North America* in 1839. These papers place at the disposal of the student much new material for the study of the memorable mission to the colony, and the circumstances under which the epoch-making report on colonial administration was prepared.

The trustees of the College of the City of New York have established a department of political science in that institution and a head of the department will be appointed at an early date.

It is announced that Prof. J. W. Burgess of Columbia, now Theodore Roosevelt professor of American history and institutions in the University of Berlin, will deliver ten lectures before Prince Augustus William, the fourth son of the German emperor, and a select company of other students.

Dr. Herman Schumaker of the University of Bonn, the first incumbent of the Kaiser Wilhelm professorship of German history and institutions at Columbia University, is offering courses on industry and banking and economic problems of Germany as compared with those of the United States. Dr. Schumaker was formerly president of the College of Commerce at Cologne and served as tutor in economics to the princes of the German imperial family. He is the author of an extensive list of publications on economic questions.

Dr. Heinrich Buhl, professor of Roman and French law in the University of Heidelberg recently died at Luxor, Egypt in his fifty-ninth year.

Albert Frederich Berner for many years professor of criminal law in the University of Berlin died recently in his eighty-ninth year. During his life he exerted a notable influence on the science of German criminal jurisprudence. In 1898 his *Lehrbuch des deutschen Strafrechts* reached its eighteenth edition, having been translated into Greek, Russian, Polish, and Servian. Two other notable contributions of his to jurisprudence were *Die Strafgesetzgebung in Deutschland von 1751 bis zur Gegenwart* and *Lehrbuch des deutschen Pressrechts*.

Dr. J. J. von Rottenburg, chief of the imperial chancery under Bismarck and a confidential adviser to the Iron Chancellor, and since 1896, curator of the University of Bonn, died in the early part of the year. Dr. Rottenburg for a time exerted a powerful influence upon German politics. He was the author of a study entitled *The Theory of the State*, published in 1877, and received the degree of Doctor of Laws from Yale University.

Upon the initiative of the Yale Good Government Club, an Intercollegiate Civic League, consisting of non-partisan good government clubs in different colleges and universities of the country, has been formed for the purpose of aiding their members to acquire information about public affairs. One means to this end now in operation is a series of letters written to the League by prominent men and published in college papers. An annual convention of the League is to be held, to which each association may send not more than five delegates. Arthur H Woods (Harvard, '92), 12 W. 44th Street, New York, is the secretary of the League.

The trustees of the George Washington University, Washington, D. C. have recently adopted a plan for the complete reorganization of the department of politics and diplomacy. Beginning next fall, the department will constitute a separate college of the University to be known as the College of Political Sciences, offering undergraduate as well as graduate courses, in which the emphasis will be placed throughout upon the political sciences, and allied subjects. A preliminary announcement of the proposed college provides for six undergraduate "groups" of courses, each designed to prepare the student for the particular career he has in mind. There will be a consular group, a diplomatic group, groups for commerce, for journalism, for the teaching of political science, for law and for administration. The university authorities announce further that the faculty will be increased by the addition of five or six men devoting themselves exclusively to teaching in the proposed college.

A new monthly magazine entitled *The Navy*, published at Washington and devoted to the interests of the naval service, the discussion of questions of international law and of foreign policy, has made its appearance.

The International Association for Labor Legislation has voted a grant of four thousand francs a year for an English edition of its

Bulletin, and has increased its appropriation for the French and German edition in order to ensure the publication of the complete text of labor laws, especially in the English speaking countries. The British Association for Labor Legislation has undertaken the publication of the English edition and now has in hand the work of translating the more recent numbers, beginning with those for 1906. Hence the American section of the Association expects soon to be able to supply its members with the *Bulletin* in the English language.

The executive committee, at its meeting in New York on December 28, determined to hold the annual meeting of the American Bar Association at Portland, Maine, on Monday, Tuesday and Wednesday, August 26, 27 and 28, 1907. The reason for selecting Monday, Tuesday and Wednesday is that the International Law Association is considering the question of holding its meeting in America this year, and the suggestion has been made to that body to hold its meeting at Portland on the last three days of the same week.

The fifteenth anniversary of the adoption of the Constitution of Iowa was celebrated March 12 to 22, with appropriate ceremonies, at Iowa City, under the auspices of the State Historical Society of Iowa.

The Legislative Voters' League of Chicago has maintained a legislative reference bureau at Springfield during the past session of the legislature of Illinois for the purpose of keeping the people informed of the merits of pending legislation. A law to establish a permanent department similar to that in Wisconsin will probably be enacted at the present session. Ohio, Indiana, California, Nebraska, and Washington as well as the City of Baltimore have already established such bureaus.

The Bureau of Statistics and Municipal Library of the City of Chicago has for distribution an attractive souvenir volume of over two hundred pages recently published for the League of American Municipalities, and which may be had for twenty-five cents by addressing Hugo S. Grosser, City Statistician, Chicago. The volume contains a review of the municipal history of Chicago and a history of the League of American Municipalities.

One hundred thousand dollars were appropriated by congress at the last session for conducting a special investigation into the condi-

tions of labor among working women and children. The act contained a proviso that no part of the appropriation should be expended for the employment of any person in making the investigation who is not now in the employment of the government or hereafter regularly appointed after competitive examination and certification through the civil service examination.

The special tax commission authorized by the legislature of New York a year ago has made an elaborate report recommending the separation of State and local taxes, making the former indirect, proposing a tax of one and one-half per cent on the gross earning of public corporations, and on the real estate and franchises of private corporations, and the "stiffening" of the inheritance tax in the direction of higher rates. The personal property tax is, in general, condemned as inequitable and unsatisfactory.

The first civil service examination under the recent executive order concerning the appointment of consuls was held at Washington on March 14. Seventeen applicants appeared of whom ten passed. The examination was both oral and written, and included one modern language (German, French, or Spanish), the commercial and industrial resources of the United States, political economy, international law, maritime law, commercial law, geography, political history, etc.

The Nobel committee of the Norwegian parliament announces that the next Nobel Peace Prize will be awarded December 10, 1907. Any one of the following persons are qualified to receive the prize: (a) Members and late members of the Nobel committee of the Norwegian parliament, as well as the advisers appointed at the Norwegian Nobel Institute; (b) members of parliament and members of governments of the different States, as well as members of the Interparliamentary Union; (c) members of the international arbitration court at the Hague; (d) members of the commission of the Permanent International Peace Bureau; (e) members and associates of the Institute of International Law; (f) University professors of political science and of law, of history and of philosophy; and (g) persons who have received the Nobel Peace Prize. The Nobel Peace Prize may also be accorded to institutions or associations.

According to the code of statutes, §8, the grounds upon which any proposal is made must be stated, and handed in along with such papers and other documents as may therein be referred to.

Henry Loomis Nelson, L.L.D., David A. Wells professor of political science in Williams College, is preparing a life of George William Curtis which will be published shortly by Messrs. Harper and Brother. It will deal particularly with the services of Mr. Curtis to the cause of civil service reform.

A new volume in the Harvard Historical Series just issued by Messrs. Longmans, Green & Co., is entitled *The Seignorial System in Canada: A Study in French Colonial Policy*, by Prof. William Bennett Munro, of Harvard University.

A committee of the New England History Teachers' Association under the chairmanship of Prof. L. B. Evans of Tufts College, has in preparation a *Syllabus of the Study of Civics in Schools.*

The Canadian government has provided for the publication, in the annual Archives Reports, of many important documents relating to the struggle for self-government in Canada. Volume I of the Report for 1906, which has recently been issued, contains the various instructions given by the home authorities to the colonial governors from time to time. Volume III, which will be ready shortly, will contain all the important hitherto unpublished constitutional documents of the period 1763–1791. This volume will be edited with notes and an introduction, by Adam Shortt, M.A., professor of political science in Queen's University, Kingston, Ont.

The department of economics at Harvard has arranged for the publication of a series of volumes to be known as the Harvard Economic Studies. Two volumes have already issued from the press, Volume I being *The English Patents of Monopoly* by Dr. William Hyde Price; and Volume II, *The Lodging House Problem in Boston*, by Dr. Albert Benedict Wolfe. A third volume on *The Stannaries: A Study of the Rise and Development of the Early English Miner*, by Dr. George Randall Lewis will appear shortly.

Messrs. G. P. Putnam's Sons announce a volume entitled *Law: its Origin, Growth, and Function*, by the late James C. Carter of New York. The same publishers also announce *The Mecklenburg Declaration of Independence* by William Henry Hoyt. Mr. Hoyt maintains that the famous document that bears that name is a fabrication and he adduces considerable evidence in support of his contention.

The President White School of History and Political Science of Cornell University has inaugurated a series of studies in history and

political science to be edited by the faculty. The first number of the series, entitled *Money and Credit Instruments in their Relation to Prices*, by Dr. E. W. Kemmerer, has appeared from the press.

Messrs. Longmans announce the early publication of *International Documents: a Collection of Conventions and Other International Acts of a Law-making Kind* with an introduction and notes by E. A. Whittuck, governor of the London School of Economics and Political Science.

Professor Goodnow's *Principles of the Administrative Law of the United States* has been translated into French by M. Jèze, professor of administrative law in the University of Lille, and is published by Giard and Brière, Paris.

A new edition (2d American) of Sir Wm. Anson's *Law of Contracts*, which has gone through eleven editions, has appeared under the editorship of Dean E. W. Huffcut of Cornell University (Oxford University Press).

A new edition of A. Inglis Clark's *Studies in Australian Constitutional Law*, is announced by the Boston Book Co. When the first edition was published there were no decisions of the high court of Australia in existence. Since then, however, a number of decisions have been rendered on important questions of Australian constitutional law, the results of which are embodied in the present edition. It may be of interest to American students to know that two of these have authoritively declared the doctrine of McCulloch v. Maryland to be applicable to the interpretation of the constitution of the Australian Commonwealth.

Harrison Moore, Esq., an English barrister, has recently published a volume entitled *Act of State in English Law* (London, 1906). It discusses the origin, meaning and development of the term "affair of state" including the doctrines of the royal prerogative and its influence on the personal responsibility of the officers of the crown.

A bibliography of the literature of municipal government with special reference to city charters and to local conditions in Chicago, compiled by Charles H. Brown of the John Crerar Library, is one of the recent publications of the City Club of Chicago.

The Congressional Library has published a valuable bibliography on inheritance taxes. It was compiled by A. P. C. Griffin, chief bibliographer of the library.

Robert Donald's *Municipal Year Book of the United Kingdom for 1906* (London, Edward Lloyd) contains a brief review of the municipal activity of each of the British municipalities in regard to gas, light and water supply, transportation, housing the working classes, markets and slaughter houses, telephones, baths and wash houses, libraries, education, cemeteries, sewage, and garbage disposal, taxation and a variety of other municipal functions.

The Macmillan Company announce the early publication of two new volumes in The Citizens Library: *The Principles of Taxation* by Max West and *The Spirit of American Government* by Prof. J. Allen Smith of the University of Washington.

At the request of the Chicago Charter Convention, Mr. A. R. Hatton of the University of Chicago recently prepared for the use of the members a *Digest of City Charters* which has been published, and is for sale by the convention. The work contains a digest of the provisions of charters, constitutions, and statutes relating to twenty American and foreign cities and will prove a convenient book of reference for students of municipal government. Two other members of the faculty of the University of Chicago who have rendered conspicuous service in the preparation of the new charter of Chicago are Prof. C. E. Merriam, who served as a member of the convention, and Prof. Ernst Freund, who prepared the draft of the charter following the agreement of the convention on the general principles to be embodied therein.

A new edition of Maine's *Ancient Law* (4th American from the 10th London ed.) with a twelve page introduction and sixty pages of notes by Sir Frederick Pollock has appeared from the press of Henry Holt and Company.

A new edition of Bliss's *Encyclopædia of Social Reform*, enlarged and brought down to 1907, has made its appearance from the press of Funk and Wagnalls.

Factory Legislation in Pennsylvania: Its History and Administration, by Lynn J. Barnard, is soon to appear from the press of the John C. Winston Co.

Orthodox Socialism, by J. E. Le Rossignol is announced by T. Y. Crowell & Co.

The Macmillan Company announce the following works of political interest, to appear this spring: L. Putnam Weale, *Truce in the East and Aftermath;* and William Bennett Munro, *The Government of European Cities.*

Politics and Disease, a new volume in the Personal Rights Series, by A. Goff and J. H. Levy (P. S. King & Son, 1907) is mainly an argument in the interest of "emancipation of man from the sins of state medicine." Among the subjects treated are State vaccination, compulsory quarantine, the contagious diseases acts, etc.

A collection of reprints of important judicial decisions, and magazine articles dealing with railway problems edited by Prof. William Z. Ripley of Harvard University, has been published by Ginn & Co. The material has been selected with excellent judgment, and is grouped under the following four heads:

The first, or historical section, affords a background for comparison and contrast with present conditions.

The second section deals with the traffic problems before the Interstate Commerce Commission and gives some insight into the origin and development of railway rates and tariffs.

The third section deals specifically with the present problem of governmental regulation in the United States. A description of the new Hepburn act is followed by a discussion of the relation of the Interstate Commerce Commission to the courts.

The fourth section presents descriptions of the present status of the railway problem in Great Britain, Germany, and France.

A new book by Mr. Frederick C. Howe, entitled *The British City: The Beginning of Democracy*, is announced by Scribners.

The Arthur H. Clark Company, announce Antonio De Morga's *History of the Philippine Islands*, edited by J. A. Roberston. The same firm announces a volume by Prof. E. G. Bourne on *The Discovery, Conquest, and Early History of the Philippine Islands.*

M. Esmein, the eminent French jurisconsult and writer on political science has recently published a life of Gouverneur Morris. (Hatchette, Paris, 1906).

Professor Gounod of the law faculty of the University of Lyons has lately written a monograph entitled *L'emigration européene au XIX siècle.* (Colin: Paris, 1906.)

M. Ernest Lehr, professor of comparative legislation in the University of Lausanne, and well known for his studies in the civil law of the principal European States has recently published a volume entitled *Études sur le droit civil des États Unis de l'Amérique du Nord* (Larose et Tenin). It deals mainly with the law of domestic relations, including the rights of married women and with the law of succession, testamentory and intestate.

A useful study in German public law is Ph. Gerber's *La Condition de l'Alsace Lorraine dans l'Empire Allemand* (Lille, 1906). It deals with the problems of military occupation and annexation, the laws of 1874 and 1879 concerning the status of the Reichsland and recent political changes.

A study of the nature and philosophy of arbitrary government has been made by Jean Cruet in his *Étude juridique de l'arbitraire gouvernment et administratif* (Paris, 1906). The author reviews the forms that arbitrary authority takes, discusses the relation of the administration to individual rights, and examines into the functions and limits of administrative jurisdiction.

The third and concluding volume of Nys' *Le droit international, les principes, les théories, les faits* has recently appeared from the press of Fontemoing (Paris, 1906). This volume deals mainly with the laws of war.

M. Hauriou's well known *Précis de droit administratif et de droit publique* has recently gone through the sixth edition (Larose et Tenin, Paris, 1906).

Le ministère des finances, organisation et attributions (Louver, Paris) is a study in French administrative law. After an historical discussion of the organization and development of the office, the author examines the powers of each of its several branches and of the court of accounts.

A valuable work to students of public law is a new volume of over eleven hundred pages entitled *Droit constitutionnel* by Leon Duguit, professor of law in the University of Bordeaux (Fontemoing, Paris, 1907.) Professor Duguit has been a teacher of public law for more than twenty years and was already well known as the author of two notable works: *L'état, le droit objectif et la loi positive* (1901), and *Les gouvernants et les agents* (1903). The present volume was designed

mainly to serve as one of a series of manuals on French public law (Moreau's *Droit administratif* being another), but it is by no means restricted in its scope to the public law of France and as a manual it is of a distinctly higher type than that which we are accustomed to expect. For purposes of treatment the book is divided into two parts, preceded by a sixty-four page introduction. Part I is of a general nature, and deals with the theory, functions, organs, and law of the State. Part II is devoted to the political organization and public law of France. It is thoroughly up to date including as it does observations on the separation of Church and State in France the Russian douma, and the French parliamentary indemnity of last November.

An attempt to collect, translate and publish all the fundamental laws, constitutional and statutory, of the more important States of the world has been made by M. Felix Moreau and M. Joseph Delpech, professors of public law in the University of Aix-Marseilles, under the title *Les règlements des assemblées législatives* (2 vols., Paris). Volume I contains German imperial, Prussian, English, Austrian, Hungarian, and Belgian laws. Volume II contains the laws of various other European andAmerican States. The laws of the Swiss Confederation and one representative Canton are included. Of American laws, only those enacted by the federal congress are included. The translations, we are assured, are made from official publications.

Cobro Coercitivo de Deudas públicas, by Señor Louis Drago, is a collection of documents relating to the so-called "Drago Doctrine" edited by Coni Hermanos and published on the occasion of the meeting of the Pan American Congress at Rio Janeiro last summer. (Buenos Ayres, 1906.)

La Republique et le Vatican (1870–1906) by Frantz Despagnet, professor of international law in the University of Bordeaux, with a preface by Gabriel Honotaux (Paris, 1906), is a review of the diplomatic and contractual relations between the French Republic and the Vatican from the establishment of the Republic to the abrogation of the concordat by the French law of December 9, 1905.

Jean Lagorgette's *Le rôle de la guerre* with a preface by M. Anatole Leroy-Beaulieu (Paris, 1906) is a study largely of the philosophy of war. The author examines the question of whether war has a real mission, classifies the causes of war, discusses the means of main-

taining peace, reviews the several kinds of armed conflicts and discourses upon the economic, social, and intellectual effects of war.

A new edition (the 4th) of Professor Berthélemy's *Traité elementaire de droit administratif* has lately appeared from the press (Paris, 1906). This work enjoys the rare distinction of having gone through four editions in five years, the third having appeared in 1905. The last edition contains a commentary on the recent law for the separation of Church and State in France, which the author pronounces the most important French law of the last one hundred years.

A volume that should be of interest to students of comparative administrative law is James Vallatton's *De la jurisdiction administrative fédérale des États-Unis et de la Suisse en matière de douanes, et de l'expertise légale des douanes en France* (Rouge et Cie, Paris). It deals mainly with questions of administrative jurisdiction in matters of valuation and classification in the administration of the customs laws of the three countries in question.

Prof. J. Berthélemy's *Le rôle du pouvoir executif dans les républiques modernes* (Giard et Brière, Paris, 1906), is a study of the American, French, and Swiss executives compared with those of Prussia and France under the second empire.

Two new contributions to the social contract theory are: Giorgio de Vecchio's *Su la teoria del contratto sociale* (Bologna, 1906); and F. Atger's *Essai sur l'histoire des doctrines du contrat social* (Paris, 1906). The former combats Jellinek's view with regard to the influence of Rousseau on the Declaration of Rights of 1789; the latter reviews the different theories of the social contract as they appear in the works of Epicurus, Cicero, St. Augustine, Marsilius of Padua, Aeneas Silvius, Junius Brutus, Suarez, and many others of the middle and modern ages.

Prof. Dr. Werner Sombert of the University of Berlin has lately published a study entitled *Warum giebt es in den Vereinigten Staaten keiner Sozialismus.* (Fischer: Jena, 1906.)

It is announced that Dr. Bernhard Dernburg, imperial director of German colonial affairs, has in preparation a detailed work on the German colonies, which is expected to appear in the near future.

Dr. Freidrich Stein, professor in the University of Halle, is the author of a monograph entitled *Zur Justizreform* in which he discusses

the question whether and to what extent Germany needs a thoroughgoing reform in her system of judicial administration (Mohr: Tübingen, 1907). It is mainly a reply to a recent work by Dr. Franz Adickes, burgomaster of Frankfort, entitled *Grundlinen durchgreifenden Justizreform* (Guttentag, Berlin). Dr. Adickes pleads for the adoption in Germany of certain English and Scotch judicial institutions and methods of procedure.

A new edition (the 5th) of von Rönne's *Das Staatsrecht der Preussischen Monarchie* by Dr. Philipp Zorn of Bonn has lately appeared from the press of Brockhaus. (Leipzig.)

New and enlarged editions of Prof. Friederich Ratzel's *Politische Geographie* and *Die Vereinigten Staaten von Amerika* have lately appeared from the press of Oldenbourg in Munich.

The fifth edition of Robert von Landmann's *Kommentar zur Gewerbsordnung für das Deutsche Reich* (Bd. I, Beck, Munich) has appeared. Volume I covers the first six titles of the Gewerbsordnung (Secs. 1 to 104.) The second volume is announced to appear this year.

Prof. Conrad Bornhak has added another to his already notable list of works on German public law. His latest contribution is entitled *Grundriss des deutschen Staatsrechts* (Leipzig, 1907) and is, in a way, a complement to his recent *Grundriss des Verwaltungsrechts in Preussen und den Deutschen Reiche.* The present work is arranged in three books. The first book, in six chapters, deals with public law of the empire; and the third is devoted to an exposition of the principles of general public law.

A new periodical, *The Leipziger Zeitschrift für Handels Konkurs und Versicherungsrecht* made its appearance from the press of J. Schweitzer (Munich) on January 1, 1907. It is under the editorship of a group of distinguished professors and jurists, among others, Dr. L. von Seuffert of Munich, Dr. Wach of Leipzig, Dr. J. Gierke of Königsberg, Dr. Kohler of Berlin, Dr. Ehrenberg of Göttingen, and Dr. Cohn of Zurich. The contents of the periodical include signed articles, critical notes on judicial decisions, summaries of legislative progress and book reviews.

A *Bibliographie der Socialwissenschaften*, edited by Dr. Herman Beck of the International Institute for Social Bibliography of Berlin,

with the coöperation of a group of foreign scholars, has appeared from the press of Boehmert (Dresden). It is a volume of over six hundred pages and covers the entire literature, periodical and otherwise for the year 1906, of the social sciences arranged under some five hundred and forty titles. Prof. David Kinley was the American collaborator.

Die Entwicklung des deutschen Städtewesens: Erster band (*Entwicklungsgeschichte der deutschen Städteverfassung*) by Hugo Preuss (Teubner, Leipzig), is a study of the German municipal system from the standpoint of its origin and historical development. It gives evidence of being a standard work in its field.

Among the studies in constitutional law, administrative law, and international law prepared under the direction of Professor Zorn of Bonn are *Der alte Reichstag und der neue Bundesrat* by H. Reincke and *Die Staatsangehörigkeit in den Kolonien*, by R. Hauschild.

A. Wengler's *Handwörterbuch der Krankenversicherung* (Breitkopf und Hörtel, Leipzig, 1906) contains a great variety of information relating to State insurance against sickness in Germany. The material is brought together under topics and arranged in alphabetical order.

The second and concluding volume of Julius Hatschek's *Englisches Staatsrecht mit Berücksichtigung der für Schottland und Irland geltenden Sonderheiten* has appeared from the press of J. C. B. Mohr (Tübingen). The second volume deals mainly with the administrative system as the first dealt with the constitutional system. The work is divided into three parts: the first dealing with the cabinet and its relations to parliament, the second with the organization of the administrative system, and the third with judicial control over the administration and the protection of private rights against encroachments on the part of the administrative officials. The work as a whole constitutes two of the volumes in Jellinek and Piloty's new *Handbuch des öffentliches Rechts der Gegenwart.*

A recent study in history and public law is *Der Thronverzicht* by Prof. Hans von Prisch of the University of Bâle (Tübingen). It is based on an investigation from the juridical side of all the cases of throne renunciation in Germany as well as of a number of other countries of Europe.

J. C. B. Mohr (Tübingen) announces *Staatsrechtliche Gesetze Württemberg's* by Prof. Dr. Fleiner, a collection of the more fundamental laws of the kingdom of Württemberg with annotations and comments. The collection includes the texts of the constitutions of 1819 and 1876, the royal house law of 1828, treaties with the North German Union, the naturalization treaty of 1868 with the United States, four laws enacted in 1906, concerning elections and various others.

A second revised and enlarged edition of the *Encyklopädie der Rechtswissenschaft* has appeared from the press of O. Häring in Berlin.

A new, enlarged and revised edition of Prof. Georg von Mayer's monograph, entitled *Begriff und Gleiderung der Staatswissenschaften* (H. Laupp: Tübingen, 1906) has recently appeared. This essay represents an attempt to classify the "political sciences" (he prefers the plural form) and set them in their proper relations. He finds fault with the classification of Robert von Mohl in his *Encyklopädie der Staatswissenschaften* and of Holtzendorff in his *Principien der Politik* as illogical and antiquated. According to his own classification they constitute a group of the "special" social sciences. In a literal sense (*Staatswissenschaften im wärtlichen Sinn*) they include those sciences that relate primarily and exclusively to particular phenomena of the State, such as political theory, public law, etc. In a secondary sense (*Staatswissenschaften im übertragenen Sinn*) they include those branches of knowledge that deal only secondarily or incidentally with the State, such as sociology, economics, statistics, jurisprudence, etc. Particularly valuable to the student are the excellent bibliographies at the end of each chapter.

Through the courtesy of the publishers or authors, the *Review* has received the following pamphlets or reprints: *Our Ex-Presidents: What Shall We Do for Them? What Shall They Do for Us?* by John Bigelow; *Arbitrary Price-making Through Forms of Law*, by Henry Wood; *Greater Canada, An Appeal: Let us no Longer be a Colony*, by Stephen Leacock; *The Necessity for a New Constitution for Missouri*, by Isidor Loeb; *Argument before the Ohio Tax Commission on the Subject of State and Local Taxation*, by Frederic C. Howe; *The Federation of the World*, by Walter T. Barrett.

Colonial Affairs

PAUL S. REINSCH

Congress has authorized the establishment of an agricultural bank in the Philippine Islands. The institution is to be modeled upon a similar bank in Egypt, which has been very successful. The regulations imposed by congress fix the maximum rate of interest at ten per cent and the maximum of loans to any one person at five thousand dollars ($5000). Though the bureau of insular affairs has brought this matter to the attention of American financiers, it has met with little response; but it will be comparatively easy to secure capital for the undertaking in Great Britain and other European countries.

The Indian National Congress which met in Calcutta from December 27 to 29 passed resolutions against the partition of Bengal, supporting the Swadeshi movement for home manufacturers, endorsing the Bengal boycott, calling for the separation of judicial and executive functions in the districts, advocating compulsory free education and the increase of the powers of legislative councils and municipalities. The boycott of British goods in Bengal was endorsed as being the only means by which a population which felt its political rights outraged could, under existing Indian conditions, make its opinion felt with the government. The partition of Bengal aroused so much violent feeling, because, by destroying a historic province, it increased the political importance of the Mohammedans, who constitute the majority of inhabitants of the new province of Eastern Bengal. The most notable event of the congress was the address of Mr. Naoroji in which he outlined the political demands of the Hindoo reform party.

To counterbalance the influence of the Indian National Congress, which is almost entirely Hindoo in its composition, an All-India Mohammedan Conference was held at Dacca in Eastern Bengal, contemporary with the national congress. This conference, composed of three thousand delegates, resolved to promote feelings of loyalty to the British government, to protect the political rights of the Indian Mussulmans, and to work for harmony with other communities in India. The partition of Bengal was endorsed by the conference.

The drift of the British expert opinion on the situation of Indian politics is indicated by the discussion in the East India Association on February 22. Mr. J. D. Anderson, of the Indian civil service, read a

paper on Indian Constitutional Problems, in which he urged especially the need for further decentralization and the strengthening of the provincial legislative councils. He also favored the increase of the members of Indian officials in the higher administration, and the establishment of a training college in India, where both Britishers and natives could be prepared for the civil service. This would remove the necessity of Indians coming to England to prepare for their examinations. Lord Reay, in the discussion of the paper, dwelt on the importance of the vice-regal legislative council, and suggested that with extended powers of election, it would become essential to safeguard the rights of minorities through proportional representation.

According to two recent dispatches of Lord Elgin, Secretary of State for the colonies (Cd. 3337 and Cd. 3340), the program of the colonial conference, convened in April, consists of the following subjects: Constitution of Future Conferences, Preferential Trade, Defence, Naturalization, Emigration, Reservation of Bills, Extension of British Interests in the Pacific. If time allows, the discussions will include the questions of uniformity of patents and merchandise marks legislation, reciprocity in admission to professions, and the adoption of the metric system. Separate discussions will be arranged with the home departments chiefly interested on certain additional subjects, of which the chief are the possibility of a universal penny postage and the adoption of a decimal currency in the empire. The colonial secretary has decided that the individual Australian States are not to be given separate representation at the conference, in addition to the Australian Commonwealth. The consideration of British interests in the Pacific was suggested by the Australian government. It is to be noted that the Canadian administration is opposed to the conclusion of any general agreement for imperial defence, nor does it favor the creation of a more formal council. The subject of preferential trade arrangements seems to be the only one which Canada feels interested in; but in this matter, no further advances are to be expected of the colony unless the mother country will grant some reciprocal benefits, and unless the fiscal autonomy of Canada can be completely guarded.

The cabinet of the self-governing colony of the Transvaal, which was sworn in on March 4, is as follows:

Premier and Minister of Agriculture, General Botha; Colonial Sec-

retary, Mr. Smuts; Attorney-General and Minister of Mines, Mr. J. de Villiers; Treasurer, Mr. Hull; Minister of Lands and Native Affairs Mr. Rissik; Minister of Public Works, Mr. E. Solomon.

The composition of the cabinet is regarded as very strong, as it contains the four most influential leaders of the Boer party. General Beyers is speaker of the assembly, and General Schalkburger a prominent member. The fact that within so short a period after the war, the leaders of the vanquished have been permitted to get political power and authority into their hands, is universally commented on as a most striking instance of the traditional liberalism of British colonial policy. General Botha will take part, as one of the colonial premiers, in the colonial conference at London. The first measure introduced by the new government is the Asiatic ordinance, which aims at the exclusion of other Indian and other Asiatic immigrants of the small trading class. This act was passed by the late legislative assembly, but was disallowed at that time by the colonial secretary. The ordinance is causing some uneasiness in India and Japan.

International Relations

PAUL S. REINSCH

On January twenty-fourth, the ambassadors of France and of Italy at Constantinople sent a joint note to the Porte which announced that certain religious establishments belonging to the Dominican and Franciscan missions in Asia Minor, which had hitherto been under the French religious protectorate, would hereafter be under Italian protection. This arrangement indicates the desire of a large number of the Roman Catholic ecclesiastics working in the near East to leave the protection of France. The historic position of France as the protector of Christian missions in the Orient appears, therefore, more seriously threatened than ever before, on account of the controversy between the French government and the Vatican.

The question of patent and trade-mark protection in China has not as yet been satisfactorily settled. At present there is no Chinese law on the subject, but by mutual agreement the leading nations of Europe and the United States have arranged that their citizens shall enjoy the same protection of these rights in China which they are guaranteed by the general treaties between these powers. Japan is

not a party to these arrangements, and it is reported that Japanese tradesmen in China have made rather unscrupulous use of this freedom from legal limitations in using the trade-marks of other nations. Several years ago the Chinese government had worked out a law for the protection of trade-marks. This project, however, was unsatisfactory to the powers, because of the high fees to be charged under it, and because it was so worded that it would have interfered with the consular jurisdiction of the powers. The ministry of agriculture, commerce, and industry has recently submitted a new project to the Wai-wu-pu, in which these objectionable features have been avoided. European and American merchants consider the adoption of such a law of great importance.

The central government of China, in January, issued orders to the governors of the principal opium-raising provinces to the effect that the area devoted to the culture of opium is to be reduced by one-tenth its former extent this year. The British ambassador at Peking has been engaged in negotiations with the government concerning the Indian opium trade. It is currently reported that an agreement was reached in February, according to which the importation of Indian opium into China is to be reduced in the same ratio as the native production.

The situation in Manchuria is still far from settled. While the withdrawal of the troops, with the exception of the railway guards, has been practically completed, the relations between the Chinese administration, on the one hand, and the Japanese and Russian authorities, on the other, have not been adjusted in any satisfactory manner. The questions of special difficulty in southern Manchuria are connected with the attempts of the Chinese officials to impose transit duties on internal trade, their desire to limit the residence and business activities of foreigners strictly to fixed settlements adjoining the treaty ports, the delimitation of the latter areas, and the adjustment of controversies with respect to leases and other real property rights acquired by the Japanese. The governor of Kiriñ, for instance, has attempted to enforce regulations providing that the settlements of foreigners shall be without the town, that all foreign business shall be carried on in these settlements, and that the Chinese local authorities shall not be interfered with in the treaty ports. The Japanese authorities and representatives have been busily engaged in

fixing the boundaries of station areas along the railway, which they control under the treaty, as well as of the Japanese settlements adjoining the treaty ports. The northern boundaries of the Kwantung territory (the southern portion of Liao-tung peninsula) have been determined; during the period of the Russian lease they had been left indeterminate. The evacuation of northern Manchuria by the Russian troops has also nearly been accomplished. The Japanese government has appointed a consul-general for Harbin and a consul for Kiriñ, and it is not believed that the Russian government will oppose any effectual resistance to the opening of the North Manchurian treaty ports. The relations between the Russian and the Chinese authorities are in a similarly unsettled condition as those described in respect to southern Manchuria.

The negotiations between Japan and Russia, relative to the application of certain dispositions of the treaty of Portsmouth and to other purposes, have not yet come to a satisfactory conclusion. The main points waiting to be settled in these negotiations are the following: The commercial rights of the subjects of one power in the territory of the other; the navigation of rivers; the creation of consulates in Oriental Russia; the question of passports; and, especially, the question of fisheries. A special Russo-Japanese commission has been appointed to determine the exact meaning of the words "inlet," and "anse," which are employed, respectively, in the English and French texts of the Portsmouth protocols. The question particularly involved is that of the size of an inlet. According to recent reports the suggestion has been made that the effort to determine the question on the principle of size should be abandoned and a compromise should be attempted by determining upon certain inlets as open to Japanese fishermen.

During the first five months subsequent to the issue of the Korean mining regulations, about one-fifth of the two hundred applications for mining concessions were disposed of. Some of the most valuable mining privileges have been granted to British, German, American, and French subjects, but the larger number of *concessionaires* are Korean and Japanese.

The question of the admission of Japanese laborers has been temporarily adjusted by orders of the president, prohibiting the immigration of such laborers from Hawaii, Canada, or Mexico. The Japa-

nese government has for some time past made it a practice not to issue any passports to laborers desiring to come directly to the United States. Such immigration as has taken place was, therefore, roundabout, through our insular possessions or neighboring countries. The American government relies upon the continuation of this practice by the Japanese government and hopes to make a more permanent settlement of the matter by treaty. The president was empowered by act of congress to issue an exclusion order, in the following terms: "That whenever the president shall be satisfied that passports issued by any foreign government to its citizens to go to any country other than the United States, or to any insular possessions of the United States or to the canal zone, are being used for the purpose of enabling the holders to come to the continental territory of the United States, to the detriment of labor conditions therein, the president may refuse to permit such citizens of the country issuing such passports to enter the continental territory of the United States from such other countries, or from such insular possessions, or from the canal zone." On the basis of this legislative authorization, the president on March 14 issued an executive order in which he recites that evidence has been produced by the department of commerce and labor, which establishes that passports issued by Japan to laborers to go to Mexico, Canada, and Hawaii are being used for the purpose of enabling their holders to come to continental territory of the United States "to the detriment of labor conditions therein." The main part of the order reads: "I hereby order that such citizens of Japan or Corea, to wit: Japanese or Corean laborers, skilled and unskilled, who have received passports to go to Mexico, Canada, or Hawaii, and come therefrom, be refused permission to enter the continental territory of the United States."

The question of school rights of Japanese children which gave rise to the more general question of exclusion, was settled by prevailing upon the San Francisco school board to admit Japanese children under certain conditions as to age and the ability to use the English language. Upon special insistence of the president, the legislature of California decided to take no action on certain bills and resolutions unfavorable to the Japanese. The fact that a school board, city officials at the time under indictment, and a State legislature had to be taken into council by the president in arranging a matter of

foreign policy impressed foreign observers with the complexity of our institutions. During the course of the controversy, the president had ordered actions to be brought to test the right of Japanese children to gain admission to the schools. These actions were later discontinued when a settlement had been reached.

The preliminary discussion of the program of the second Hague conference has revealed a great difference of opinion among nations as to the advisability of discussing the joint limitation of military expenditure. The British government is strongly in favor of including this subject in the program; the British prime minister has even made an appeal to public opinion, through an article in the new liberal paper, *The Nation*, in which he dwells upon the established pacific and commercial policy of Great Britain and the groundlessness of all suspicions against her. The principal continental nations are not, however, inclined to look upon the matter in this way. Considering the vast handicap under which they suffer when confronted with the British naval establishment, they seem to feel that a policy of making the present ratio of expenditure permanent would give Great Britain a permanent and increasing advantage. In the tentative program submitted by Russia to the European chancelleries, the question of limitation of armament is not referred to. On account of the policy of Great Britain to surround Germany with hostile alliances on all sides the latter power is unwilling to fall in with the British plan, nor does the idea find favor even in France. At present the annual naval expenditure of Great Britain is about two and one-half times as large as that of either France or Germany and three times as large as that of Russia. It is not considered likely, therefore, that the subject will be included in the official program. A more specific discussion and determination of the laws of war appears to have a better chance of realization.

A recent decision by Judge Ewing in the United States circuit court at Pittsburg to the effect that a nonresident alien is not entitled to the benefit of a statute giving a right of action for death of another by wrongful act calls attention to the abnormal status which such suitors occupy in some states.

The general rule is that statutes are presumed to have no extraterritorial force. (Endlich: *Interpretation of Statutes*, §169.) Neither in Lord Campbell's act, nor in the various State statutes creating a

cause of action for death by wrongful act is there any express provision that the action may be maintained by a nonresident alien. The English courts have held that the provisions of Lord Campbell's act by which damages can be recovered for death caused by negligence do not apply for the benefit of aliens abroad; that it is a principle of English law that acts of Parliament do not apply to nonresident aliens unless the language of the statute expressly refers to them; that the power of the country is to legislate for its own subjects all over the world, and as to foreigners within its jurisdiction, but no further. Adam v. British and Foreign S. S. Co. (1898) 2 Q. B. 430. To the same effect are Deni v. Pennsylvania R. Co. 181 Pa. 525; Brannigan v. Union Gold-Min. Co. 93 Fed. 164 (U. S. Cir. Ct. Col.); McMillan v. Spider Lake S. & L. Co. (Wis. 1902) 60 L. R. A. 589.

In Mulhall v. Fallon, 176 Mass. 266, it is conceded that legislative power is territorial, and that no duties can be imposed by statute upon persons who are within the limits of another State, but it is held that rights can be offered to such persons, and if the power that governs them makes no objection, there is nothing to hinder their accepting what is offered; and accordingly that a nonresident alien may sue under a statute giving damages for death from negligence. Commenting on the English case cited above, it is said: "Our different relation to our neighbors, politically and territorially, is a sufficient ground for a more liberal rule." To the same effect are Kellyville Coal Co. v. Petraytis, 195 Ill. 215; Vetaloro v. Perkins 101 Fed. 393 (U. S. Cir. Ct. Mass. 1900); Bonthron v. Phoenix Light & F. Co. (Ariz. 1903) 61 L.R.A. 563. See in general 54 L.R.A. 934, note.

Count Lamsdorf, Russian minister for foreign affairs from 1900 to 1903, died at San Remo on March 19. He entered the public service in the foreign office in 1866 and remained there continuously until 1903. His career is an illustration of the continuity of diplomatic experience in Russia, and it calls to mind the fact that Russia had only five ministers of foreign affairs during the period from 1815 to 1900.

The thirteenth annual Lake Mohonk Conference on International Arbitration will be held on May 22-24. President Nicholas Murray Butler will act as presiding officer. In the discussions, special stress is to be laid on Pan-American interest in international arbitration.

The first annual meeting of the American Society of International Law was held at Washington, D. C., April 19 and 20. The program comprised papers and discussion on the following topics:

1. Would immunity from capture during war of non-offending private property upon the high seas be in the interest of civilization?
2. Is the trade in contraband of war unneutral and should it be prohibited by international and municipal law?
3. Transference from municipal courts to an international court of all prize cases.
4. Is the forcible collection of contract debts in the interest of international justice and peace?
5. The rights of foreigners in the United States in case of conflict between federal treaties and State laws.
6. The second Hague conference and the development of international law as a science.

The representatives of the European powers in Morocco have presented two joint notes to the Maghzen in which they insist on the necessity of restoring order at Mogador, and protest because certain reforms called for by the Algeciras act have not been put into effect. The chief clauses involved deal with coastwise trade, cattle export, and the purchase of land by foreigners. Notwithstanding the poor financial condition of the country, several large contracts for harbor works have been made with French and German construction companies. Internal intrigues and general insecurity continue. French troops, in March, occupied Oudja near the Algerian frontier, on the claim that the security of the region demanded such action.

Though Anglo-Russian relations in Persia have not as yet been made the subject of a formal treaty, it is reported that an understanding has been arrived at, according to which these two powers will observe a policy of strict neutrality and non-intervention in the internal affairs of that country. Nevertheless, in March, serious disorders at Sebzewar in northern Khorassan threatening the lives of resident Russian subjects, Russian troops were set in motion to restore security.

The fact that Canada, though still formally a ward of Great Britain, is taking an important position in the family of nations, has recently been attested by the visit of Secretary Root to the Dominion, as well as by the conferences between the British ambassador, Mr. James Bryce, and the Canadian government. Among the diplomatic ques-

tions pending between Canada and the United States, to the solution of which the above meetings are expected to contribute in no smal degree, are the following: Commercial reciprocity and transit of merchandise, Niagara Falls preservation and water rights, seal protection and fisheries, application of alien labor laws, and complete determination of boundary lines.

The United States senate adopted the following resolution, February 15:

Whereas, It is alleged that the native inhabitants of the basin of the Congo have been subjected to inhuman treatment of a character that should claim the attention and excite the compassion of the people of the United States; therefore, be it

Resolved, That the president is respectfully advised that, in case he shall find such allegations are established by proof, he will receive the cordial support of the senate in any steps, not inconsistent with treaty or other international obligations or with the traditional American foreign policy which forbids participation by the United States in the settlement of political questions which are entirely European in their scope, he may deem it wise to take in coöperation with or in aid of any of the powers signatory of the treaty of Berlin for the amelioration of the condition of such inhabitants.

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[1]Official publications of Great Britain, India and many of the British colonies may be purchased of P. S. King & Son, Orchard House, 2 and 4 Great Smith Street, Westminster, London. Cd. refers to papers presented to Parliament by command.